TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 372

THE CITY OF CINCINNATI, PETITIONER,

vs.

MARGARET W. VESTER

No. 373

THE CITY OF CINCINNATI, PETITIONER,

vs.

JAMES S. RICHARDS AND PASCHAL L. RICHARDS

No. 374

THE CITY OF CINCINNATI, PETITIONER,

vs.

LLEWELLYN B. REAKIRT

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 4, 1929

CERTIORARI GRANTED OCTOBER 21, 1929

(34,503, 34,504, 34,505)

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DISTRICT COURT OF THE UNITED STATES

SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

Margaret W. Vester,
Plaintiff,

vs.

The City of Cincinnati,
a municipal corporation
under the laws of Ohio,
Defendant.

In Equity
No. 555

AMENDED BILL—Filed Oct. 29, 1928. Harry F. Rabe, Clerk.

Now comes the plaintiff and says that the defendant is a municipal ocrporation under the laws of Ohio; that the amount in controversy herein is in excess of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs, and that this controversy arises under and upon the Fourteenth Amendment to the Constitution of the United States of America, upon which palintiff bases this action, and that the jurisdiction of this federal court is invoked upon that ground.

Plaintiff says that she is the owner of a tract of land in the City of Cincinnati, Hamilton County, Ohio, 27 feet front on the east side of Broadway, 44 feet south of Fifth Street, extending east parallel with Fifth Street between parallel lines 90 feet, containing a three story brick occupied by a physician's office and dwelling rooms, known as No. 426 Broadway; that the defendant, the City of Cincinnati, on July 6th, 1927, passed a certain resolution declaring its intent to appropriate for street widening purposes a strip of land 25 feet wide adjacent to the south line of Fifth Street easterly from the east line of Main Street to the west line of Pike Street, a distance of about five blocks intersected (from west to east) by Lawson Alley, Sycamore Street, Broadway, McAllister Street, for the purpose of widening said Fifth Street 25 feet, and at the same time declared its intent to appropriate certain other lands in excess of the above described property necessary for said street widening, including a tract of land next adjacent thereto approximately 75 [illegible] wide and extending all the way from Broadway east-

erly to the next street on the east, known as McAllister Street, and which includes the aforesaid property of plaintiff, said resolution being entitled, "A Resolution declaring the intention to appropriate property for street widening purposes and in furtherance of said purpose to appropriate property in excess of that actually to be occupied by said improvement."

By Section 3 of said resolution the Council declared that said appropriation of said excess property is in furtherance of the widening of Fifth Street and necessary for the complete enjoyment and preservation of said public use, but no public use of said excess is specified or stated.

Thereafter, upon March 21st, 1928, the defendant, by its Council, passed an ordinance to appropriate and did attempt to appropriate said property in accordance with said resolution, stating that said excess condemnation was "for the more complete enjoyment and preservation of the benefits to accrue from said public use", and did order the City Solicitor to apply to a court of competent jurisdiction to have a jury impaneled to make inquiry into and assess the compensation to be paid for the several parcels of land affected, including the property of this plaintiff, as aforesaid, and thereupon the said City Solictor did on May 4th, 1928, file an application in the Court of Common Pleas of Hamilton County, Ohio, in a case entitled The City of Cincinnati vs. Sarah Smythe, et al, being case numbered A 8538 on the docket of said court, to assess compensation, and did cause notice to be issued to the various property holders, including this plaintiff, thereof and has caused the said case to be set down for trial on or about the 17th day of September, 1928.

The property above described sought to be appropriated from this plaintiff is not within the limitation of the 25 foot strip aforesaid desired for the widening of Fifth Street, nor will it abut upon said street as widened; but that it will be separated from said widened street by an intervening lot nineteen (19) feet wide now owned by another person.

Plaintiff says that her said property is not taken for any public use; that the said resolution declaring the intent of the city expressly recites that the same is not necessary for said street widening, and that the same is "in excess of that actually to be occupied by said improvement"; that no public use whatsoever to be made of said property has been stated by the defendant, and

that the action of the defendant in attempting the appropriation thereof is a mere speculation upon an anticipated increase in the value of the properties adjacent to said improvement when made, and said property is taken for the purpose and with the design of reselling the same at a profit to private individuals to be used for private purposes, and no use of said property by or for the public is intended or contemplated. The Charter of the City of Cincinnati is silent upon and does not purport to authorize any such excess condemnation.

The proposed taking of plaintiff's property constitutes a taking of said property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, which this plaintiff invokes.

Plaintiff further says that the area of the property attempted to be taken by way of excess condemnation south of said twenty-five (25) foot strip is not uniform in depth and is laid out in accordance with no uniform rule, and that the lots embraced therein are of no uniform area, dimensions, or classification; that in some instances lands adjacent to the proposed improvement are omitted and in other lands are taken to unequal depths. From Main Street to Lawson Alley the property taken by way of excess condemnation is seventy-five and 40/100 (75.40) feet deep; from Lawson Alley to Sycamore Street the same is one hundred and twenty-four and 67/100 (124.67) feet in depth; from Sycamore Street to Broadway no property whatever is taken by way of excess condemnation, the property being left undisturbed in possession of present owners.

Plaintiff further says that whereas the property of the plaintiff lying forty-four (44) feet south of Fifth Street, fronting on the east side of Broadway, as aforesaid, is taken by way of excess condemnation, yet the property directly across and on the west side of Broadway equally distant from the improvement is not so taken.

Between Broadway and McAllister Street and also between Lawrence and Pike Streets the property taken by way of excess condemnation is about seventy-five (75) feet in depth, but between McAllister Street and Lawrence Street no property whatever is so taken, the same being left in the possession of its present owners.

While said property so taken by way of excess condemnation is taken with expectation and purpose on the part of the defendant that the increase in the value of

same, including plaintiff's property and other properties similarly situated, which may accrue to the city by reason of the widening of Fifth Street, upon a resale will repay to the city the cost of making the said widening, yet the property upon the north side of Fifth Street between Main Street and Pike Street and the property immediately north thereof which is in its general character and condition, and for the most part in its improvement similar to that upon the south side of Fifth Street and will receive whatever benefits, if any, result from said street widening equally with the property on the south is nevertheless to be permitted to remain undisturbed in private ownership.

Plaintiff says that the classification of the lands so subjected to excess condemnation is arbitrary and unjustly discriminates against plaintiff and others within the area of the proposed excess condemnation in favor of lands similarly situated and equally distant from the same, and that the plaintiff is thereby denied the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States, which the plaintiff invokes in this behalf.

Plaintiff further says that by the laws of Ohio (General Code Section 3679) in order to warrant the appropriation of private property by municipal corporations it is necessary said corporation should by resolution define the purpose of the appropriation; that the defendant never has defined the purpose of this excess appropriation by resolution. That it is necessary under the laws of Ohio that the application for the assessment of compensation disclose the object proposed to be accomplished by such appropriation, but that the application filed by defendant in the Court of Common Pleas to appropriate said property fails to make any other disclosure of the object of said appropriation of the property in question than to say that the same is taken in furtherance of the public use of widening Fifth Street "by way of excess appropriation in accordance with the provision of Article XVIII, Section 10, of the Constitution of Ohio."

Plaintiff says that notwithstanding the unconstitutionality, illegality, and insufficiency of attempted appropriation the plaintiff is, under the laws of Ohio and the decisions of its Supreme Court, without any adequate remedy at law that can be asserted either in response to said application to assess compensation or otherwise.

Plaintiff further says that the said resolution so declaring the intent to appropriate said property was

passed upon July 6th, 1927; that the property of this plaintiff has been kept under appropriation proceedings, unconstitutional and invalid for the reasons hereinabove set forth, now for more than one year last past; that its marketability and availability for improvement and value have been thus impaired, and that the plaintiff has suffered, is suffering and will suffer great injury, for all of which she is without adequate remedy at law, and her said injury is and will be irremediable unless the said appropriation acts herein complained of are enjoined by this honorable court.

Wherefore, the plaintiff prays that the defendant be perpetually enjoined from proceeding with said excess condemnation or from appropriating any part of this plaintiff's property except that actually desired for the widening of Fifth Street and within the 25 foot strip aforesaid, for a temporary injunction pending the hearing of this cause, and for all such other, further and general relief as plaintiff is in equity entitled to receive.

Peck, Shaffer & Williams,
Attorneys for Plaintiff.

State of Ohio,)
Hamilton County.) ss.

Margaret W. Vester, being first duly sworn, deposes and says that she is the plaintiff in the above entitled action and that the facts set forth in the foregoing Amended Bill are true.

Margaret W. Vester.

Sworn to before me and subscribed in my presence this 27th day of October, 1928.

Walter C. Kister,
Notary Public, Hamilton County, Ohio.

File
Hickenlooper, J.
(Seal)

STIPULATION—Filed Nov. 10, 1928.

It is stipulated that the following correction may be made on the face of the bill:

Page four, second whole paragraph, line four, change "width" to "depth";

Sixth line from the end of paragraph change "wide" to "deep":

Fourth line from the end of same paragraph change "width" to "depth";

Page five, first paragraph, line three, change "width" to "depth".

Approved,

Hickenlooper, J.

Peck, Shaffer & Williams,
Attorneys for plaintiff.
John D. Ellis,
Attorney for defendant.

ANSWER TO AMENDED BILL—Filed Nov. 20, 1928.

Now comes defendant, the city of Cincinnati, and for answer to amended bill filed herein, admits that it is a municipal corporation under the laws of Ohio; that the amount in controversy herein is in excess of Three thousand dollars ($3,000.00), exclusive of interest and costs; that plaintiff is the owner of a tract of land on the east side of Broadway, as described in the petition; that the city of Cincinnati on July 6, 1927, passed a resolution declaring its intent to appropriate for street widening purposes a strip of land 25 feet wide adjacent to the south line of Fifth Street, from the east line of Main Street to the west line of Pike Street and at the same time declared its intent to appropriate certain other lands in excess of said 25 foot strip including a tract of land fronting approximately 75 feet on Broadway and extending

eastwardly to McAllister Street, including the said property of plaintiff, the said resolution being entitled as set forth in said amended bill; that in Section 3 of said resolution council declared that said appropriation of said excess property is in furtherance of the widening of Fifth Street and necessary for the complete enjoyment and preservation of said public use, that thereafter on March 21, 1928, council passed an ordinance to appropriate said property among other properties, in accordance with said resolution, stating that said excess appropriation was "for the more complete enjoyment and preservation of the benefits to accrue from said public use" and ordered the city solicitor to apply to a court of competent jurisdiction to have a jury impaneled to make inquiry into and assess the compensation to be paid for the several parcels of land affected, including the property of plaintiff, as aforesaid; that thereafter on May 4, 1928, the city solicitor filed an application in the common pleas court of Hamilton County, to wit: City versus Smythe, et al, No. A-8538, and caused notice to be issued to the various property holders, including plaintiff, and that the hearing at the time of the filing of petition herein had been set for September 17, 1928.

Defendant further admits that the property of plaintiff as appropriated by defendant is not within the limitation of the 25 foot strip desired for the widening of Fifth Street; that it will not abut upon said street as widened and that it will be separated from said widened street by a strip of land nineteen (19) feet wide now owned by another person, that the said property is in excess of that actually to be occupied by said improvement of Fifth Street; that the charter of the city of Cincinnati makes no reference to the subject or condemnation or excess condemnation; that the excess property appropriated south of the twenty-five foot strip is not uniform in depth; that the area of said excess appropriation is as stated in the amended bill; that no property on the north side of Fifth Street has been appropriated.

Defendant denies that said property is not taken for any public use and that no public use is stated in the resolution and ordinance providing for said appropriation; that the action of defendant in attempting the appropriation thereof is a mere speculation upon an anticipated increase in the value of the properties adjacent to said improvement when made; that the proposed taking of plaintiff's property constitutes a taking of the said property without due process of law, contrary to the 14th Amend-

ment of the Constitution of the United States; that the excess property is laid out in accordance with no uniform rule; that the classification of the lands subjected to excess condemnation is arbitrary and unjustly discriminates against plaintiff and others; that plaintiff is by said proceedings denied the equal protection of the laws; that said proceedings are contrary to the laws of Ohio; that plaintiff has suffered, is suffering and will suffer great injury by reason of the proceedings of the city of Cincinnati by way of appropriation or excess appropriation.

Further answering, defendant says that the two squares of Fifth Street west of Main Street, to wit: Government Square and Fountain Square, are in the heart of the city of Cincinnati and that a large amount of traffic comes into said squares and proceeds eastwardly over Fifth Street. The width of Fifth Street in the two squares west of Main Street is 130 feet from property line to property line; the width of Fifth Street east of Main Street is 66 feet, from property line to property line. Defendant says that it proposes to widen Fifth Street from Main Street eastwardly to Pike Street to a total width of 91 feet by appropriating 25 feet on the south side of Fifth Street for street purposes.

Defendant says that after said Fifth Street from Main Street to Pike Street shall have been improved to its new width, it will be the widest and most imposing of the city's streets in the present main business district. The buildings at present existing along said south side of Fifth Street, with the exception of the Masonic Temple from Sycamore Street to Broadway, and the Fontbonne building from McAllister Street to Lawrence Street, (which said buildings have been set back to conform to the new street width) are almost without exception of great age and not capable of being used or remodeled in a manner suited to the proposed broad highway, particularly in view of the fact that nearly all the parcels of real estate along said south side of Fifth Street from Main Street to Pike Street are of small size and frontage.

Defendant says that it has appropriated in their entirety all the parcels fronting on Fifth Street from Main Street to Pike Street with the exception of said Masonic Temple property and Fontbonne property, heretofore referred to, and in addition, three tracts fronting on the east side of Broadway lying within 100 feet of Fifth Street, and two tracts on the west side of Pike Street,

lying within 100 feet of Fifth Street. Defendant says that in so doing, it is operation under the provisions of Section 10 of Article XVIII of the Constitution of Ohio, as follows:

> "Section 10. A municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made."

Defendant says that by applying the principle of excess condemnation as herein proposed, it will be able to further the appropriate development of Fifth Street from Main Street to Pike Street as a notable highway in the city of Cincinnati. Defendant says that by using the powers conferred by said Section 10 of Article XVIII of the Constitution of Ohio, it will be able after said widening has become effective, to dispose of lots of land of such size and subject to such restrictions as shall be best suited to the new highway.

Defendant says that plaintiff's lot lies parallel with Fifth Street at a distance of 44 feet from the existing south line of Fifth Street, and at a distance of 19 feet from the proposed new south line of Fifth Street, as shown by blueprint plat hereto attached, marked "Exhibit A". Defendant says that after the widening of Fifth Street, the southeast corner of Fifth Street and Broadway will be a prominent corner in the city of Cincinnati, fitted to be the site of a large and attractive public or private building, or of some other important public or private use. Defendant says that said strip of 19 feet between plaintiff's north line and the new south line of Fifth Street will be incapable of development by itself as a suitable lot for the erection of a building worthy of the corner it will occupy.

Defendant further says that the building of plaintiff on her said lot is an old building not suited to its location under existing conditions and utterly unsuited for the situation after Fifth Street shall have been widened. Defendant says that at the present time, the said building is incapable of producing a reasonable income on its present market value, which market value is purely speculative and founded on the hope that some corporation or individual will at some time in the future find it necessary

or profitable to buy out plaintiff and a sufficient number of her neighbors to provide an adequate building site.

Defendant further says that by means of its control of the said parcels appropriated between Broadway and McAllister Street, it will be able to assist in the appropriate development of said territory, whereas, if the said development is left to the hazard or private bargaining involving a large number of private interests, the appropriate development of said tract from Broadway to McAllister Street is likely to be delayed for a long period of time or made impossible.

Defendant further says that the present reasonable market value of the property of plaintiff described in the petition under the conditions at present existing is the sum of Forty-six thousand six hundred dollars ($46,600.-00). Defendant says that after the widening of said Fifth Street is completed, the said property will have a reasonable market value very much in excess of said sum of Forty-six thousand six hundred dollars ($46,600.-00). The increase in said market value will be due entirely to the new conditions created by the widening of Fifth Street and the proposed appropriation.

Defendant says that by paiyng plaintiff the reasonable value of her said property, as described in the petition, plaintiff will be deprived of no constitutional rights nor of any other right except the right of delay or make impossible the appropriate development of said property between Broadway and McAllister Street in accordance with the needs of business, industry and the public.

In conclusion the city of Cincinnati expects two things in connection with the application of the principle of excess condemnation of the plaintiff's property and to other property along the south side of Fifth Street from Main Street to Pike Street, to wit:

1st—That the city will be able to further the appropriate development of the south side of Fifth Street, between Main and Pike Streets by using or disposing of its excess in tracts of such size and with such size and with such restrictions as will inure to the public advantage.

2nd—That the increase in value of plaintiff's property and other properties which may accrue by reason of the improvement contemplated by the city will pay in part the very heavy expense to which the city will be put in effecting the improvement.

Answer to Amended Bill

Wherefore, defendant prays that the petition of plaintiff may be dismissed at her costs and that defendant may go hence without day.

City of Cincinnati,
By John D. Ellis,
City Solicitor,
By Ed. F. Alexander,
Assistant City Solicitor.

State of Ohio, }
County of Hamilton. } ss.

JOHN D. ELLIS, being first duly sworn, says that he is the city solicitor of the city of Cincinnati, and that the facts set forth in the foregoing answer are true, as he verily believes.

John D. Ellis.

Sworn to and subscribed to before me this 20th day of November A. D. 1928.
(Seal)

Bess Argo
Notary Public, Hamilton County, Ohio.

NARRATIVE STATEMENT OF EVIDENCE IN NOS. 555, 556 AND 557—Filed Jan. 7, 1929.

Appearances:

Mr. John Weld Peck, on behalf of plaintiffs.
Messrs. John D. Ellis, City Solicitor, and
Ed. F. Alexander, Assistant Solicitor, on behalf of defendant.

The above entitled causes were heard together and evidence taken before Honorable Smith Hickenlooper,

John W. Vester

Judge of the District Court of the Southern District of Ohio, on November 23, 1928, as follows:

JOHN W. VESTER: I live at 2235 Burnet Avenue, Mt. Auburn, and am the husband of the plaintiff in this case, Margaret W. Vester. She is the owner of the property in question in this bill which is 27 feet front on the east side of Broadway and lies 44 feet south of Fifth street. I am also the owner of the drug store at the corner of Fifth & Broadway, but that is not the property involved in this case. My wife's property is a residence building occupied by a physician, my son, on the first floor. It is suitable for the purposes of a physician's office and has been built for that purpose. The lower floor has been occupied as a physician's office for the last ten or twelve years. My son is in the active practice of medicine; he is a member of the staff of the Good Samaritan Hospital and a general practitioner and surgeon. He desires to remain in this property. I make no objection to the widening of Fifth Street as such, that is to the condemnation of a 25 foot strip on the south side of Fifth Street. The south line of Fifth Street as widened will be 18 feet from the north line of my wife's property.

Plaintiff here offered in evidence, a plat of the property to be condemned marked "Plaintiff's Exhibit Number 1."

Between my wife's property and the corner property, there is a building occupied by Dr. Joseph Podesta. There is a space on each side of my wife's property so that it is not physically joined to the Podesta property. At the southwest corner of Fifth and Broadway is the John Van Range Company building. That building was formerly occupied as a manufacturing site and is now offered for rent as a loft building or offices to be remodeled to suit the tenant. The sign in the window of the building says that it is offered for long or short term lease for offices or loft. This building was formerly occupied as a manufacturing building and sales room by the John Van Range Company who are manufacturers of hotel equipment and kitchen utensils.

The property on the south side of Fifth Street is perfectly level. To the best of my memory my wife has owned her property for twelve or fifteen years and my drug store has been located at the nearby corner for

John W. Vester

twenty-eight years. The property on the north side of the street is level. Recently there have been a few buildings put up on the north side of Fifth Street but otherwise the buildings on that side are about the same as those on the south side, and the property generally is about the same thing except where new buildings have been put up. The Masonic Temple Building is west of and immediately adjacent to building of the John Van Range Company. The Masonic Temple Building is new.

Cross-examination:

I do not know who owns the John Van Range Company building. I have noticed the character of the walls of that building; they are made of concrete—I saw the building put up.

My son has occupied the office in my wife's building I think going on three years; prior to that it was occupied by Dr. Spargur and Dr. Davis. Dr. Spargur became ill and had to give up the building and my son succeeded him. The other doctor did not care to take it over.

Q. What rental did you receive from that property before your son occupied it?

Objection by counsel for plaintiff was sustained by the court and an exception reserved by counsel for the defendant.

It was agreed by counsel for the plaintiff and the defendant referring to plaintiff's exhibit No. 1, that the key located at the lower right hand side of the plat offered in evidence may be considered as part of the evidence and that the figures on the plat for frontages refer to feet and one-hundredths part of feet; that the shaded portions of said plat indicate the part occupied by buildings that is that the shaded portions included within lines indicate the buildings; that no property is being taken by way of excess condemnation between Sycamore Street and Broadway; that no property is being taken by way of excess condemnation between McAllister and Lawrence; that as for the rest of the appropriation the south boundary of the excess condemnation is the south boundary of the part which is marked with diagonal lines in accordance with the key on plaintiff's exhibit No. 1.

JUDGE PECK: "That is the only separate evidence which I care to offer for Mr. Vester".

James S. Richards Llewellyn B. Reakirt

JAMES S. RICHARDS: I live at 1302 Edwards Road, Hyde Park. I am a member of the bar, but do not practice. I and my brother are the owners of the leasehold estate set forth in my bill. We have a lease for a term of years giving the privilege of purchase at a certain price.

Our property lies 61 feet west of Pike street on the south side of Fifth Street and is next to the property of Mr. Philip Morton. The improvement on our property consists of an apartment building containing five apartments. All are rented. The property complies with the building ordinances and the statutes of the city and state. I make no objection to the condemnation of the front 25 feet for the widening of Fifth Street; my objection relates only to the excess appropriation. All of the property on both sides of Fifth Street is level and the buildings on each side of the street are about the same with one or two exceptions where improvements have been made.

Cross-examination:

Q. What is the rental that you receive for your apartments?

The above question was objected to and the court overruled the objection.

A. One hundred and seventy six dollars ($176.-00) a month.

I do not know how old that building is. I have had possession of it for almost five years under a lease, with privilege of purchase. I bought the leasehold interest paying about Three thousand dollars ($3000.00) for the leasehold and then improved the property afterwards. The balance of the purchase price is Fifteen thousand dollars ($15,000.00).

LLEWELLYN B. REAKIRT: I live at 2020 Auburn Avenue, Mt. Auburn, Cincinnati and am the owner of the several tracts of land which lie at the south-west corner of Fifth & Sycamore Streets, being composed of five different lots which in their aggregate are 149.67 feet on the west side of Sycamore street and 138.81 feet on the south side of Fifth street. I have owned this property for probably twenty-five years or more. I make no objection to the condemnation of the north 25 feet for the purpose of widening Fifth street. There is no building

on the property; part of it is occupied by a filling station and the rest of it is a parking place for automobiles —in the main it is a vacant lot. At the northeast corner of the lot there is a filling station building that is fifteen feet square that has a little porch in front of it under which automobiles drive to get their gasoline. The corner post of this porch sticks out into the twenty five feet to be appropriated. At the south end of the lot there is a little shed where the caretaker of the parking lot stays. This is unimproved property and is perfectly level. I think there is about a foot difference in the elevation from the corner of Fifth and Sycamore to the southeast corner of the lot. The property is under a perpetual lease subject to certain privileges and with certain rentals to Mr. Walter J. Friedlander dated the 25th of May, 1925.

Counsel for the plaintiff offered this lease in evidence marked "Plaintiff's Exhibit No. 2."

WALTER J. FRIEDLANDER: I live at 688 North Crescent Avenue, Cincinnati. I am the owner of the lease marked "Plaintiff's Exhibit No. 2". The action of the city in not allowing us a permit to put up a building and these condemnation proceedings have interfered with the erection of a building on that lot.

Q. If you shall be at liberty to improve your property, what is the general nature or character of the improvement that would be built upon it?

The above question was objected to by counsel for the defendant; the court sustained the objection whereupon counsel for the plaintiff reserved an exception and proffered in evidence that the lessor and lessee have contemplated the erection of splendid improvements there and it would be splendidly improved by this time but for the action of the city in insisting upon this excess condemnation.

Q. Mr. Friedlander, heretofore and during your ownership of this lease had you planned, or have plans been made for the erection of buildings upon this land which have been interfered with by these condemnation proceedings?

A. Yes, we have such plans.

Mr. Alexander: I object.

The Court: The answer may remain in.

Mr. Alexander: Note an exception.

Q. Have you requested the city to release this property from excess condemnation for the purpose of putting up such building?

Mr. Alexander: I object.

The Court: He may answer.

Answer: Yes, we have had a good many conferences with the city.

Q. And what was the nature of the building that you had the plans for and actually proposed the erection of there?

Mr. Alexander: I object.

The Court: I will sustain the objection—the same question as heretofore offered.

Judge Peck: May I let him answer just for the purpose of the proffer of the proof?

The Court: Yes.

Whereupon counsel for the plaintiff proffered the following evidence. "It was proposed to erect an athletic club on this property—it was to be a fifteen story building, costing about One million three hundred thousand dollars ($1,300,000.00)".

Q. Assuming this street is widened by twenty-five feet and this property left in the possession of the lessees, state whether or not in your judgment it will be available for a building of the best type.

Mr. Alexander: I object.

Q. In a city such as this?

A. It would.

Mr. Alexander: I think the property will speak for itself, if your honor please, size and location of the property.

The Court: The answer may remain in.

Q. And even assuming that Fifth Street is not widened, state whether or not in your judgment this tract of property would be available for such a building?

Mr. Alexander: Same objection.

The Court: He may answer.

A. It would.

No cross-examination.

WILLIAM O. MASHBURN: I live at 2146 Cameron Avenue, and am jointly interested with Mr. Friedlander

in the ownership of this lease. This lease has a substantial market value. I am familiar with the plans for the erection of a big athletic club on this corner.

Q. State why, if at all, if there is any reason, why the building was not erected?

Mr. Alexander: I object.

The Court: Mr. Friedlander has testified to that has he not?

Judge Peck: Yes, your Honor, I just wanted to supplement it by the testimony of Mr. Mashburn.

The Court: He way answer.

Mr. Alexander: Note my exception.

A. On account of the interference of the city, and this suit.

No cross-examination:

Whereupon counsel for the plaintiff offered in evidence and read to the court a stipulation between counsel as to evidence, the same being offered as evidence in each of the three cases herein and marked "Plaintiff's Exhibits Nos. 3, 4 and 5."

Counsel for the defendant reserved an exception to item No. 7 of said stipulation on the ground that the character of the buildings on the north side of Fifth street is not competent in this case; said exception being noted by the court. It was thereupon agreed between counsel for the plaintiff and counsel for the defendant that the city is not condemning any property on the north side of Fifth street.

Whereupon the plaintiff rested its case.

Thereupon the defendant offered the following testimony.

HIRMAN S. MATHERS: I live at 426 East McMillan Street, Cincinnati and have been a real estate broker for over thirty-nine years. I have been employed on various occasions as appraiser in the appraisal of real estate taken for public purposes and other purposes. I was employed by the city of Cincinnati to appraise the parcels of real estate which the city proposes to take in connection with the improvement of Fifth Street from Main Street to Pike Street. I have appraised the property of Margaret W. Vester, 428 Broadway, the third piece south of Fifth Street on the east side.

Hirman S. Mathers

Q. What was the value of that property as it at present stands according to your investigation?

Counsel for the plaintiff objected to the above question; the court sustained the objection, whereupon counsel for the defendant proffer the following testimony.

(The present value of the Vester property at 428 Broadway is in the opinion of this witness the sum of forty six thousand six hundred dollars ($46,600.00) and this witness would testify that after the improvement of Fifth street, the value of the property would be in excess of that amount.)

I would not be able to state the character of the Vester property but it is a building apparently fifty or sixty years old and probably older. I have not been through the building. It is a three story building.

I have investigated the Richards property on Fifth Street near Pike. The dimensions of that property are twenty-three by one hundred (23 x 100). The property runs through from Fifth Street to a twenty (20) foot alley, called Buchanan Street.

Q. What in your opinion is the value of that property as it stands today?

The above question was objected to by counsel for the plaintiff. The court overruled the objection and an exception was noted.

A. Twenty eight thousand eight hundred dollars ($28,800.00).

Q. What in your opinion would be the amount payable to the owners of that property if only the twenty-five foot strip were taken; that is including the damages that would be suffered.

A. Fifteen thousand dollars ($15,000.00).

Judge Peck: We object to that your Honor.

The Court: He may answer.

Judge Peck: Exception.

After the improvement on east Fifth street is made the value of the seventy-five feet left would be in excess of its present value.

I have investigated the property at the southwest corner of Fifth and Sycamore, known as the Reakirt

property, having a frontage of 138 feet and a fraction, and a depth of 150 feet along Sycamore street.

Q. What in your opinion is the value of the property at the present time as it stands?

Judge Peck: We object to that your Honor.

The Court: I can't see the relevancy of it. The witness may answer subject to the objection.

Judge Peck: Exception.

A. Five hundred and fifty five thousand three hundred and twenty dollars ($55,320.00).

Q. What in your opinion is the value of the twenty five foot strip taken off the north side of this property?

Judge Peck: May I also have an objection to that question?

The Court: Same ruling.

Judge Peck: Exception.

A. Ninety two thousand five hundred and fifty dollars ($92,550.00).

I have read the lease from Mr. Reakirt to Mr. Friedlander and know its terms. In my opinion that leasehold has a value over and above the interest of Mr. Reakirt. Practically all of the buildings along the south side of Fifth street between Main and Pike streets, are old buildings, except the Government Square Garage which is next west of the Reakirt property and about thirty feet east of the alley east of Main street; the Masonic Temple and the Fontbonne building. You would hardly term the John Van Range Company building an old building but it is probably twenty-five years old. I could never find out the exact date when that was built. It is a very good substantial building and could be used for offices or merchandising or factory. The other substantial buildings on the south side of Fifth Street are the Tietig building at the southwest corner of Fifth and McAllister and the new building at the southwest corner of Fifth and Pike. Aside from these buildings that I have specified the buildings are all old. The only exception is one at the corner of the alley east of Main street. There has been a new front put in that and some alterations made, but the side walls are still there. The others are all residence property now except Mr. Vester's corner at Fifth and Broadway; that has a store on the corner. What I have said as to the character of these buildings applies also to the three buildings on the

east side of Broadway which are included and the two or three buildings on the west side of Pike street which are included.

Cross-examination:

I have never been inside of Mr. Richards's house. He was away at the time and we did not go through. I had been through the house about two years previous to that. I do not know the extent of the improvements Mr. Richards has made in converting the building into flats. We made the estimate on what we thought possibly it was.

After Fifth Street has been widened twenty-five feet, the residue of the property will be more valuable than the residue would be at the present time. In other words it is my view and judgment that the widening of Fifth Street will benefit all the property on the south side from Main Street to Pike Street. The property on the north side should also receive a similar benefit. It is of the same character as the south side except certain buildings. On the north side there has only been two buildings I believe built in recent years; the Fenwick Chapel and the Fleisher Building between Broadway and Sycamore. The rest of the property on the north side of Fifth Street is of the same character as that on the south side, except that between Sycamore and Main they are store buildings principally. The other part is more or less residence property.

Redirect Examination:

I have never given the subject any particular study but the main feature in producing an increase in value in this property would be the widening of Fifth street.

Recross-examination:

Q. That aggregating of parcels would in and of self.

A. That would probably come about.

Q. I say, that aggregating of parcels would in and of itself increase values, would it not?

A. Yes, but that would follow the widening of Fifth street.

Q. Whether the city condemned the excess or not?

A. Not necessarily, but a natural consequence.

Thereupon counsel for the defendant offered in evidence a certified copy of a resolution by the Council of

Hiram S. Mathers Joseph W. Frietsch Erwin Kraemer

the city of Cincinnati, Ohio, dated July 6, 1927, marked Defendant's Exhibit A.

Counsel for defendant also offered in evidence a certified copy of Ordinance No. 155-1928 of the city of Cincinnati, Ohio marked Defendant's Exhibit B.

Counsel for the defendant also offered in evidence photographs showing the south side of Fifth street marked Defendant's Exhibit C to O inclusive. At this point counsel for the plaintiff offered in evidence photographs of the north side of Fifth street marked Plaintiff's Exhibits Nos. 6 to 14 inclusive.

Counsel for the defendant objected to the introduction of the Plaintiff's Exhibits 6 to 14 inclusive. The court overruled the objection and counsel for the defendant reserved an exception.

JOSEPH W. FRIETSCH: My office address is 708 Mercantile Library Building, Cincinnati, Ohio, I have been engaged in the business of a real estate broker for over forty years and in that time, have done a great deal of work in appraising real estate. Mr. Mathers and I worked together in the appraisal of these properties in connection with the east Fifth street condemnation. I have heard his testimony and would testify the same way Mr. Mathers did. We have agreed upon the joint valuations.

ERWIN KRAEMER: I live at 311 Oregon Street, Cincinnati and am Assistant Civil Engineer of the City Planning Commission. I have occupied that position since June 1926. Prior to that time, I spent two years with Technical Advisory Corporation who were the Consulting Engineers for the city plan.

Thereupon counsel for the defendant offered in evidence a plat marked Defendant's Exhibit P.

Defendant's Exhibit P, being adopted by the Planning Commissioner sets forth thoroughfares either as existing streets or planned as thoroughfares, and proposed extensions to already existing thoroughfares so as to link up the street system and make a co-ordinated ssytem of circulation throughout the city for main arteries. This plan was adopted by the city on March 5, 1925 as stamped on the face of the drawing. The plan indicates an extension, by means of symbols and legends which are on

the plan, from Fifth and Pike streets in a general eastwardly direction to about the intersection of Third and Eggleston Avenues where it meets another intersection, then going on eastwardly with a new street and extension, so as to link up with the so-called Columbia Avenue Boulevard. According to the plan this linking is make by means of a viaduct over Eggleston Avenue—one, or maybe more than one, will be necessary. There is also another viaduct connection over Eggleston Avenue running from Third Street.

The voters in I think 1926, authorized the issue of bonds for the development and completion of a drive from Third and Pike Streets to Madison and Grandin Road. There have not as yet been any provisions for this viaduct connection from Fifth and Pike over to the Third Street viaduct. Assuming that the Third Street viaduct is built the most convenient method of approach from Government Square to the Third Street viaduct would be by means of Fifth Ftreet and Pike Street to Third.

Thereupon counsel for the defendant offered in evidence a plat marked Defendant's Exhibit Q.

The title of Defendant's Exhibit Q is "Alternate Routes from the Proposed Fifth Street Extension, prepared by the City planning Commission, 1924". This particular drawing shows the various schemes or alternatives for the extension of Fifth street to link up with the intersection of Madison Road and Grandin Road.

Thereupon counsel for defendant offered in evidence a plat marked Defendant's Exhibit R.

The title of Defendant's Exhibit R is; "The Third Street—Columbia Avenue—Torrence Road Boulevard". It is known as Accession No. 15,877 of the Department of Highways, Cincinnati, The heavy blue line on this plat shows the route that would be used should the Fifth Street viaduct not be built, so as to connect Government Square by the Third Street—Columbia Avenue—Torrence Road Boulevard to Madison and Grandin Roads.

Cross-examination:

The council of the city of Cincinnati has not to my knowledge authorized the extension of the Fifth Street viaduct. These plans are mere proposals of the planning commission. The planning commission is a body that has the power of adopting official plans but they do not have the power to put through the plan. They recommend and the city council is the one that passes on it. The city council has never adopted any Fifth Street

Erwin Kraemer

viaduct to my knowledge. Defendant's Exhibit R is a plan for a Third Street—Columbia Avenue—Torrence Road Boulevard and contemplates that the boulevard should extend from Third Street in the city of Cincinnati across on a viaduct over Eggleston Avenue and out Columbia Avenue and Torrence Road. I do not know who penciled Fifth Street instead of Third Street as a connection on this plat. That was a part of the route —in other words the using of Pike Street. I don't know whether or not the route contemplated when the plat was drawn was Third Street; the legend says nothing about Fifth Street—someone in the highway department put this blue pencil mark on the plat—that is a part of our office record. This blue penciling was done previous to 1926. I first saw this plat somewhere in the latter part of 1926 and at that time, it had this blue pencil mark on it. There has been and there still is to a certain extent a great deal of discussion as to the best method of approach of the proposed Third Street viaduct. I would not say that the more direct line would be to approach it by Third Street from the heart of the city because if the heart of the city we consider to be Fountain Square we would have to go southwardly on some other street; Walnut, Vine or Main, to Third, but if we go out on Fifth to Pike, which is a sort of diagonal in that section, it is a somewhat shorter distance over Fifth.

There are a good many things such as the surface of the street, congestion and the opportunity for driving, that could influence an automobile driver to take either Fifth Street or Third Street, as circumstances might dictate.

Redirect Examination:

If you go to the viaduct from Fountain Square by way of Third Street, you would have first to go down a considerable grade to get to Third Street—the best and most level grade is by way of Fifth and Pike Streets.

Recross-examination:

If you go by way of Fifth Street after you get to Pike Street there is some grade, but it is a very low grade compared to the hillside street from Fourth to Third.

Whereupon counsel for the defendant offered in evidence a certified copy of Ordinance No. 318-1927 of the city of Cincinnati, marked Defendant's Exhibit S also a certified copy of a Resolution of the Council of the city of Cincinnati passed September 1, 1926 marked Defend-

Erwin Kraemer W. O. Mashburn J. S. Richards

ant's Exhibit T also a certified copy of the abstract of the votes passed at the referendum referred to in Defendant's Exhibit T, marked Defendant's Exhibit T-1.

Whereupon defendant rested the case.

Thereupon the plaintiff offered the following evidence in rebuttal.

WILLIAM O. MASHBURN: I am familiar with the value of my property at the corner of Fifth and Sycamore Streets and have had negotiations concerning it. I have studied it in the view of market values. I do not agree with the value placed thereon by Mr. Mathers and in my judgment the property is worth greatly in excess of five hundred and fifty thousand dollars ($550,000.00). Dealings have been had or offers made upon basis greatly in excess of that sum.

No cross-examination.

JAMES S. RICHARDS: I am familiar with the value of the property I own on the south side of Fifth Street and with values in that neighborhood. I am the owner of other properties in the neighborhood. In my judgment the value stated by Mr. Mathers, Twenty eight thousand eight hundred dollars ($28,00.00), does not reflect the true value of my property. In my view the property is worth greatly in excess of that sum.

Cross-examination:

I own the property on the north side of Fifth Street between Main & Pike, almost opposite from the property I own on the south side. I bought this piece in question almost five years ago upon the basis of $18,000.00, but I put much money in improvements since. I have spent approximately $6,000.00 on the property so that it now stands me at this time about $24,000.00. Whatever value there is has come to it in my opinion, since I bought it. This street has changed very much during the period since I bought the property. There have been two wonderful improvements there the Masonic Temple and the Fontbonne. These improvements certainly brought additional value. I think the Masonic Temple does considerable business in its Auditorium. The theatre there brings big crowds there that weren't there before. Since I bought my property the John Van Range

Company has moved out and abandoned its business at the southwest corner of Broadway & Fifth. The Masonic Temple has acquired that property as I understand it. That is the general understanding that the Masonic Temple has bought it. I don't know anything about the deeds.

Thereupon plaintiffs rested the counsel proceeded with oral argument.

The foregoing, including the exhibits introduced as aforesaid, to-wit: plaintiffs' exhibits Nos. 1 to 14 inclusive and defendant's exhibits Nos. A to T inclusive and No. T-1 is all the evidence that was before the court and is all the evidence in these causes upon the issue joined in each cause between the respective plaintiffs and defendant the City of Cincinnati by the amended bills filed by the respective plaintiffs and the answers to said amended bills filed by the City of Cincinnati; and is all the evidence upon which the respective decrees and orders of November 26, 1928, in said causes were made and entered.

And the court hereby certifies that those parts of the evidence herein reproduced in the exact words of the witness were directed to be so reproduced by the judge at the request of the parties hereto.

Approved: January 7, 1929.

Peck, Shaffer & Williams,
Attorneys for Plaintiffs.
John D. Ellis,
City Solicitor,
Ed F. Alexander,
Assistant Solicitor,
Attorneys for Defendant.

Approved as a statement of the evidence, January 7th, 1929.

Smith Hickenlooper,
Judge.

OPINION UPON FINAL SUBMISSION IN NOS. 555, 556 AND 557—Filed Nov. 28, 1928.

Hickenlooper, District Judge (Orally, November 24, 1928):

As I stated yesterday, I realize that in the several cases of Vester, Reakirt and Richards against the City of Cincinnati time is distinctly of the essence as far as the interests of the litigants are concerned. Counsel do not so much care for the decision of the nisi prius court as for an early appeal and determination by the Court of Appeals. For this reason I am disposed to render an oral opinion from the bench rather than to attempt a more detailed study of the questions involved or perhaps a more scientific and carefully prepared opinion.

I think that it may be conceded as an elementary principle of our law, that property may be taken by and through condemnation proceedings only for a public use. Perhaps one of the fundamental and deeply rooted principles of our law is that personal ownership of property shall be held inviolate. This personal ownership must of course be subservient to and yield to the public need, but insofar as that need is not for public use the inviolability of private ownership must be preserved.

I think it is also evident that whether by State Constitution or enactment of the Legislature, any law which authorizes condemnation for other than a public purpose must fall as contrary to the Fourteenth Amendment of the Federal Constitution, which provides that one shall not be deprived of his property without due process of law. Due process of law contemplates and requires the public use in condemnation proceedings before such a taking would be upheld. In these cases it is not necessary that the court assume to declare a provision of the State Constitution null and void as in conflict with the Federal Constitution. If the action of the municipality deprives the plaintiffs of rights guaranteed them by the Constitution of the United States then such action of the municipality may be enjoined, leaving the constitutional provision to be operative in cases in which they may lawfully be applied. It is of course not necessary to here define the scope of those cases in which this constitutional provision may be held operative. Doubtless a number would suggest themselves to the minds of counsel and perhaps are rather vividly suggested by the twelfth power of appropriation granted to municipalities in section 3677 of the General Code. This section provides that

municipalities shall have power to appropriate property for public purposes—

> "12. For establishing esplanades, boulevards, parkways, park grounds, and public reservations in, around and leading to public buildings, and for the purpose of reselling such land with reservations in the deeds of such resale as to the future use of such lands, so as to protect public buildings and their environs, and to preserve the view, appearance, light, air and usefullness of public grounds occupied by public buildings and esplanades and park ways leading thereto."

This is the only section of the General Code of which the court has knowledge which appears to have been passed with direct reference to Article 18, Section 10, of the State Constitution. It suggests to the mind of the court that perhaps this section of the constitution was intended—certainly it has been applied—to supplement or provide a power of zoning the environs of some public improvement.

Counsel for the plaintiffs have also suggested that it might include the condemnation of property adjacent to a public improvement necessary for the maintenance of that improvement, such as an easement of lateral support. This power the municipality always had and it is doubtful whether any additional constitutional provision was necessary to give that power to the municipality. But whatever the proper and appropriate scope of this provision of the constitution may be, it is necessary here only to determine whether or not the rights guaranteed by the Federal Constitution to the several plaintiffs have been invaded by the action of the municipality with regard to whether there are other cases in which the constitutional provision might be applied or other instances for its appropriate application. The cases cited on the part of the plaintiffs likewise establish, and are not disputed by the city, that injunction will lie in the event the use be not a public one and, in fact, that this is practically the only appropriate remedy in the State of Ohio.

The question thus resolved itself into whether the purpose or use here disclosed is a public one. Ordinarily the purpose of the condemnation is declared by the legislation, by the declaration of intention to condemn. An examination of this legislation in the present cases discloses that 25 feet are taken for street purposes. The so-

called excess is not taken, so far as appears from the legislation, for any generally recognized public use but, in the language of council, and in the language also of the State Constitution, has been appropriated simply in furtherance of the use for which the 25 feet has been taken. Just how it is in furtherance of the use is left to conjecture or at least to determination from the evidence introduced in these cases.

Argument of counsel for the City suggested whether this was then a justiciable question, whether it was a subject open to inquiry. Having been declared as taken in furtherance of the public use, can the court inquire whether it is in fact thus in furtherance of such public use? Were the resolutions of council to the effect only that it was necessary to appropriate the entire depth of the property sought to be condemned for the purpose of widening Fifth Street and providing public squares or thoroughfare improvement, the court would be clearly of the opinion that we could not pass beyond that declaration of intention or inquire as to the good faith of the city in making the appropriation; we would have to accept that declaration of intention as final and conclusive and the use would thus be a public use—so declared and so in fact. This situation, however, would present multiple difficulties if, having so appropriated the property for street purposes the city council and those in control decided subsequently to change the improvement and to sell off a portion of the property thus appropriated. Questions of the right of reverter in cases of abandonment of street uses might arise and, clearly, difficulties would be presented which could not be anticipated with safety by the city. But however that may be, there has been no attempt upon the part of the city to make an appropriation of the entire depth of the properties involved for street purposes. Nor is there apparent from the evidence or from the legislation itself any way in which the appropriation of the excess depth can serve to benefit, advance, or in any way preserve the public improvement which is the "piece de resistance" of the entire proceeding.

It is frankly conceded, I think, in argument if not in the evidence, that the purpose of this excess condemnation was the recoupment, by dealing in real estate, of a large portion of the heavy expense necessary for this project. So far as we have been able to analyze the evidence, this is the only motive or purpose of the excess condemnation, the only method in which such excess

condemnation can, in the language of the constitution, be in furtherance of the public use. Not even slight suggestions are given to the court as to the restrictions which shall be imposed in case of resale to preserve the improvement made, except and unless such restrictions may be considered as founded upon the intent to aggregate the numerous parcels so appropriated, or to consolidate into one ownership a multiplicity of individual ownerships.

Counsel for the defendant has urged upon the court that one of the chief justifications for excess condemnation may be found in the theory of remnants, that is, that legitimate condemnation may produce small remnants of real estate left in the hands of the original owners or such parcels as are irregularly shaped and of little or no practical value, that in the case of these the city will eventually pay the total value of the entire parcel and should be entitled to take such entire parcel and to dispose of the remnant to adjoining property-owners, so that such property-owners might procure a frontage upon the improvement and possibly bear their share of the expense. Upon this contention it is only necessary to say that in none of the cases of these plaintiffs, with the possible exception of the Richards case, is the doctrine of remnants even remotely applicable. Counsel has conceded in argument that that cannot be styled a remnant which in fact is not so. Certainly with reference to the Reakirt property the north one-sixth, approximately—almost exactly—only is taken; the remainder is of sufficient size to make it available for almost any use to which it could be put in its entirety, that is, before condemnation. In the case of the Vester property no parcel or part of this property is taken whatsoever, and the entire tract cannot therefore be said to be a remnant left after condemnation. It is true that there is a possible remnant just north of the Vester property; the Podesta property has, I think, eight feet taken from its northerly side. This leaves some nineteen feet in the Podesta property which is not to be classified with those cases where but a few feet or a few inches are left adjacent to the improvement. The present drugstore of the plaintiff Vester is but seventeen feet in width; the present Podesta property is susceptible certainly of the same use to which the corner property is now put. But even though this division of the Podesta property might justify the city in taking the remnant of that property and disposing of it to Vester or elsewhere, the fact of

an adjacent remnant does not seem to the court to justify the taking of a wholly independent tract not adjacent the improvement, not in any way connected with it, no more nearly related to it than other property on the north side of Fifth Street or on any of the intersecting streets in the immediate neighborhood.

The court is also of the opinion that excess condemnation might be justified, and if authorized by statute or constitution might be indulged in, in cases where the appropriation of property so damages the improvements upon the real estate itself or upon the real estate so appropriated as to substantially cover the entire value of the parcel, in other words, where property has upon it very valuable improvements in the way of building structures and the condemnation proceedings cut that building in half or so reduced it in size that the value of the ground is the minor consideration in the assessment of damages while the damages to the improvement is the major consideration. In such cases the improvement upon the property appropriated being practically destroyed it would seem that the city should be given the privilege of taking such property in its entirety and of availing itself of any value in the real estate that might remain by way of recouping some of the damage sustained or some of the compensation required through the destruction of such improvement. In this manner the property-holder would receive the full value. The land value remaining might then be considered by the remnant of the original value of the improved real estate. The city might to a certain extent receive the benefit of the increment in value due solely to the street improvement, which of course may not be taken into consideration in assessing damages at the time of condemnation. Considerations of fairness and justice toward the city might authorize the excess condemnation proceedings in cases of this sort also but here again we are not concerned with this, for neither the Constitution nor the General Code nor the legislation in this particular case have taken this ground as the basis for the excess condemnation. This doctrine would further apply only to the Richards case, for, as I have said, the Vester property is not cut in two, the Reakirt property is unimproved, and no such improvements are therefore destroyed.

With reference to the Richards parcel, and unquestionably to other parcels in that neighborhood, the building will be seriously damaged. Constructed to the north property line, 25 feet will be taken from that building,

leaving a portion of the structure remaining which, at least in the mind of the court, it is doubtful will be susceptible to reconstruction or repair. But, as I have said, logical as such excess condemnation might appear upon the theory that the land value remaining constitutes but a remnant of the full value, we are inclined to believe that the matter cannot be considered at this time as founded upon any such doctrine.

We have thus seen that the remnant theory and the substantial damage to improvements upon real estate are both inapplicable to the present cases, and the only remaining question is whether or not financing the main improvement or the theory of replatting or aggregating small parcels may be considered as a public use. There has been some discussion in argument as to the precise definition of a public use. The court feels that, at least, a public use must be a use of the property for the benefit of the public, a use of the property for some period, short or long, a use of the property as property for the benefit of the public. This is recognized by Section 10 of Article 18 of the Ohio Constitution, which specifically provides that the excess appropriation shall be "in furtherance of" the public use and that the restrictions imposed upon resale shall be appropriated "to preserving the improvement made". This requires we think direct and substantial relationship in the furtherance and protection of the improvement between the property itself and the improvement. Certainly, the mere appropriation of excess for the purposes of resale at a profit is not in furtherance of the purpose of the municipal improvement here, which is the construction of a street or highway. Nor would any restrictions that might be imposed upon the resale of this property in any way affect or preserve the improvement of the street. In fact, the only suggested restrictions have been that the city might aggregate the separate parcels and thus restrict building in this vicinity to that of such size and nature as would improve the entire locality and benefit the community as a whole. This is not a restriction in support of or connected with or in any way preserving the improvement of Fifth Street. It is a general community benefit, wholly disassociated from the precise public improvement undertaken by the city. Certainly, the city has no power to enter into the realm of a dealer in real estate for financial gain only; and when there is a marked line of seperation between the improvement and the dealing in real estate, and the only possible connection between the two is the en-

tering upon a business for profit in order to make possible the improvement, then it would seem clear to the court not only that the city is not acting under the constitution, but further that the attempted exercise of power is beyond authority of law.

The court is very strongly impressed with the fact that the decisions upon the subject of excess condemnation are practically uniform and one way. Courts of last resort in Massachusetts, Virginia and Pennsylvania —I have not examined the New York case cited—but at least in these three the courts have held that excess condemnation, at least for the purposes here involved, was in contravention of the Federal Constitution and could not be supported. There are no decisions cited to the court precisely to the contrary, all authorities cited by the defendant being in the nature of persuasive authority or argumentative development of the contentions of the defendant. In the case of **Clark v. Nash,** 198 U. S. 361, which was strongly relied upon by the defendant, there was a public purpose in the development of the entire surrounding community. In the West irrigation is as vitally a public purpose as the maintenance of a system of electric light, water supply, or gas distribution in the East. To provide for irrigation or the right to irrigation is to subserve a public purpose; to require the individual right in property to be subservient to the right of the public to obtain irrigation is to further a public use. The same distinction may be made as to **Strickley v. Highland Boy Gold Mining Co.,** 200 U. S. 527, which was also strongly relied upon. The development of the mineral resources of a State redound to the benefit of the entire State and constitute in a way a public service, at least to the extent that rights of condemnation of means of transporting the ore or removing it from the mine to a railroad may be, as they were there, upheld. The case of **Old Dominion Land Co. v. United States,** 269 U. S. 55, presents to our way of thinking no support for the doctrine of excess condemnation, for having entered upon the property in time of war—I think this was that case—and constructed the warehouses upon it; the war having ended the Government was given the right to perfect its condemnation proceedings in order to preserve its interest in the property. This was much in the nature of a **nunc pro tunc** condemnation proceeding.

Some argument has been presented on behalf of the plaintiffs that the fact that certain buildings on the south side of Fifth Street were not taken demonstrated

that the plaintiffs were being deprived of equal protection of the laws. We were at the time and are now unable to see the application of that argument, for there is no right, as a right, in the individual to be free from condemnation. If the city be justified in condemning property it may make selection of that property which it will condemn and the fact that certain property is not condemned, as on the north side of the street, will not affect the validity of the condemnation of other property, as upon the south side of the street, for the very reason that there is no obligation not to condemn. That resting in the discretion of the city, these particular plaintiffs are deprived of no right which they hold as of right, assuming the condemnation to be valid. The condemnation may be invalid under the Fourteenth Amendment but not because, in the attempted exercise of the right to appropriate the city has considered it necessary to take the property of one but not of another.

On the whole, we are unable to believe that the only possible ground for this excess condemnation which is disclosed or even suggested in the present cases, that is, the dealing in real estate for profit, bears any such close connection with the improvement or constitutes such a public use as would justify this excess condemnation. We therefore feel constrained to grant the prayers of the several petitions, nothwithstanding the fact that the plaintiffs have entered this case with a strong presumption of the constitutionality of municipal acts against them. The court will not lightly declare any action unconstitutional; in fact it will not do so except a violation of the Constitution appears clear and manifest. In the present case it is believed by the court to have that aspect, to carry with it the necessary conviction of unconstitutionality.

So far as the petitioning property-holders are concerned, therefore, and only so far as their interests have been presented to the court, the action of the city will be enjoined for, as I have said, in the opinion of the court it is the unconstitutionality of result which is here sought to be enjoined. The court passes only upon the question whether as to these particular plaintiffs their constitutional guaranties have been violated by the municipality and finds that as to these particular plaintiffs their constitutional rights have been impinged upon.

Decree may be taken accordingly.

Smith Hickenlooper,
District Judge.

Opinion upon Final Submission, Etc.

For Plaintiffs: Hon. John Weld Peck,
Milton Sayler.

For Defendant: John D. Ellis,
Solicitor, City of Cincinnati, Ohio;
Edward F. Alexander,
Ass't Solicitor, City of Cincinnati, Ohio.

FINAL DECREE—Filed Nov. 26, 1928.

This cause came on to be heard upon the amended bill and answer thereto and upon the evidence and argument of counsel, and upon consideration thereof the Court do find for the plaintiff.

Wherefore, it is ordered, adjudged and decreed that the defendant, The City of Cincinnati, be and hereby is perpetually enjoined from appropriating under its Resolution of July 6, 1927, and its Ordinance of March 21, 1928, the plaintiff's tract of land in the City of Cincinnati, Hamilton County, Ohio, twenty seven (27) feet front on the east side of Broadway lying forty four (44) feet south of Fifth Street and extending eastwardly parallel with Fifth Street between parallel lines ninety (90) feet, or any part thereof, and that the title of the plaintiff to said property be and hereby is quieted as against the appropriation attempted to be made by defendant by the Resolution and Ordinance aforesaid, and it is further ordered that the plaintiff recover from the defendant her costs herein, to all of which the defendant excepts.

Enter:

Smith Hickenlooper,
District Judge.

PETITION FOR APPEAL—Filed Jan. 7, 1929. Harry F. Rabe, Clerk.

To the Honorable Smith Hickenlooper, District Judge:

The above named, the city of Cincinnati feeling aggrieved by the decree rendered and entered in the above entitled cause on the....day of November, A. D. 1928 does hereby appeal from said decree to the Circuit Court of Appeals for the sixth circuit for the reason set forth in the assignment of error filed herewith, and petitioner prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings, and documents upon which said decree was based, duly authenticated be sent to the United States Circuit Court of Appeals for the sixth circuit, under the rules of such court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of it be made.

The City of Cincinnati,
John D. Ellis,
City Solicitor.

Appeal allowed upon giving bond as required by law for the sum of $250.00.

Smith Hickenlooper,
Judge.

ASSIGNMENT OF ERRORS—Filed Jan. 7, 1929.

Now comes the defendant in the above entitled cause and files the following Assignment of Errors upon which it will rely upon its prosecution of the appeal in the above entitled cause, from the decree made by this Honorable Court on the 26th day of November, 1928.

Assignment of Errors

I.

That the United States District Court for the Southern District of Ohio, Western Division, erred in its decision and judgment as follows:

The city of Cincinnati having filed an application in the Court of Common Pleas, Hamilton County, Ohio, to assess compensation for the appropriation of certain parcels of real estate abutting on or near to the south side of Fifth Street in said city, partly for street widening purposes and partly by way of excess condemnation, including the lot of plaintiff appellee, fronting twenty-seven (27) feet on the east side of Broadway, forty-four feet south of Fifth Street, extending east, parallel with Fifth Street, between parallel lines ninety (90) feet, all of said lot to be taken by way of excess condemnation in pursuance of Section 10, Article XVIII of the Constitution of Ohio, the said District Court enjoined such appropriation on the grounds as by reason of such excess condemnation, defendant appellant would be depriving plaintiff of his property without due process of law, contrary to the provisions of Section 1 of Article XIV of the amendments to the Constitution of the United States.

Wherefore appellant prays that said decree be reversed and that the said District Court of the Southern District of Ohio, Western Division, be ordered to enter a decree reversing the said decision in said cause.

John D. Ellis,
City Solicitor,
Ed. F. Alexander,
Assistant City Solicitor,
Attorneys for Appellant.

CITATION—Filed Jan. 7, 1929.

UNITED STATES CIRCUIT COURT OF APPEALS.
For the Sixth Circuit

To Margaret W. Vester—Greeting:

You Are Hereby Cited and Admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said Circuit, within thirty days from the date hereof, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of Ohio, wherein the city of Cincinnati, a municipal corporation is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William Howard Taft, Chief Justice of the United States, this 7th day of January in the year of our Lord one thousand nine hundred and twenty-nine and of the Independence of the United States of America the one hundred and fifty-third.

Smith Hickenlooper,
Judge, United States District
Court of Ohio.

State of.....}
County of .....} ss.

On this.....day of....., A. D. 192 , personally appeared before me, a Notary Public in and for said County, ... and made oath that he delivered a copy of within citation to.....
.....
.....
.....

Sworn to and subscribed before me this .....
day of ....., 192
.....
.....
.....

Service of the foregoing citation waived and appearance entered.

Peck, Shaffer & Williams,
Attorneys for Margaret W. Vester.

BOND ON WRIT OF ERROR OR APPEAL—Filed Jan. 7, 1929.

Know All Men By These Presents

That we, the city of Cincinnati, a municipal corporation, organized and existing under the laws of Ohio, as principal and The Aetna Casualty and Surety Company, as sureties, are held and firmly bound unto Margaret W. Vester in the full and just sum of Two Hundred and 00/100 ($200.00) Dollars, to be paid to the said Margaret W. Vester her certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 7th day of January, in the year of our Lord one thousand nine hundred and twenty-nine.

Whereas, lately at a regular term of the District Court of the United States for the Southern District of Ohio, Western Division in a suit depending in said Court between The City of Cincinnati, a municipal corporation organized and existing under the laws of Ohio a decree was rendered against the said City of Cincinnati, a municipal corporation organized and existing under the laws of Ohio and the said City of Cincinnati, a municipal corporation organized and existing under the laws of Ohio having obtained an appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said Margaret W. Vester citing and admonishing her to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said circuit, on the Sixth day of February next.

Now, The Condition of The Above Obligation is Such that, if the said City of Cincinnati, a municipal corporation organized and existing under the laws of Ohio shall prosecute said appeal to effect, and answer all damages and cost if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

.....

.....

The City of Cincinnati [Seal]
by Ed F. Alexander [Seal]
Asst. Solicitor [Seal]

Bond on Writ of Error or Appeal

The Aetna Casualty and Surety Company,
By John B. Sauten
Attorney in Fact. [Seal]

Approved by—
Smith Hickenlooper,
United States District Judge,
Southern District of Ohio.

UNITED STATES DISTRICT COURT

Southern District of Ohio
Western Division

James S. Richards and Paschal S. Richards,
Plaintiffs,
vs.
The City of Cincinnati, a municipal Corpration, under the laws of Ohio,
Defendants.
No. 556

AMENDED BILL—Filed Nov. 9, 1928. Harry F. Rabe, Clerk.

Now come the plaintiffs and say that the defendant is a municipal corporation under the laws of Ohio; that the amount of controversy herein is in excess of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs, and that this controversy arises under and upon the Fourteenth Amendment to the Constitution of the United States of America, upon which plaintiff bases this action, and that the jurisdiction of this federal court is invoked upon that ground.

Plaintiffs say that they are the owners of a leasehold

tract of land in the City of Cincinnati, Hamilton County, Ohio, on the south side of Sixth Street, sixty-one (61) feet west of Pike Street, twenty-three (23) feet front, extending south at right angles one hundred (100) feet to Buchanan Street. That the defendant, the City of Cincinnati, on July 6th, 1927, passed a certain resolution declaring its intent to appropriate for street widening purposes a strip of land twenty-five (25) feet wide adjacent to the south line of Fifth Street including the north twenty-five (25) feet of plaintiffs said property, for the purpose of widening Fifth Street twenty-five (25) feet, and at the same time declared its intent to appropriate in excess of the above described property necessary for said street widening a tract of land adjacent thereto including all of the residue of the plaintiffs' said property. Said resolution being entitled, "A Resolution declaring the intention to appropriate property for street widening purposes and in furtherance of said purpose to appropriate property in excess of that actually to be occupied by said improvement." By Section 3 of said resolution the Council declared that said appropriation of said excess property is in furtherance of the widening of Fifth Street and necessary for the complete enjoyment and preservation of said public use, but no public use of said excess is specified or stated. Thereafter, upon March 21st 1928, the defendant by its Council passed an ordinance to appropriate and did attempt to appropriate said property in accordance with said resolution, stating that said excess condemnation was "for the more complete enjoyment and preservation of the benefits to accrue from said public use", and did order the City Solicitor to apply to a court of competent jurisdiction to have a jury impaneled to make inquiry into and assess the compensation to be paid for the several parcels of land affected, including the property of these plaintiffs, as aforesaid, and thereupon the said City Solicitor did on May 4th, 1928, file an application in the Court of Common Pleas of Hamilton County, Ohio, in a case entitled The City of Cincinnati vs. Sarah Smythe, et al, being case numbered A-8538 on the docket of said court, to assess compensation, and did cause notice to be issued to the various property holders, including these plaintiffs, thereof and has caused the said case to be set down for trial on or about the 17th day of September, 1928.

The property above described sought to be appropriated from these plaintiffs by way of excess condemnation is not within the limitation of the 25 front strip

aforesaid desired for the widening of Fifth Street. Plaintiffs say that the said property is not taken for any public use; that the said resolution declaring the intent of the city expressly recites that the same is not necessary for said street widening, and that the same is "in excess of that actually to be occupied by said improvement"; that no public use whatsoever to be made of said property has been stated by the defendant, and that the action of the defendant in attempting the appropriation thereof is a mere speculation upon an anticipated increase in the value of the properties adjacent to said improvement when made, and said property is taken for the purpose and with the design of reselling the same at a profit to private individuals to be used for private purposes, and no use of said property by or for the public is intended or contemplated. The Charter of the City of Cincinnati is silent upon and does not purport to authorize any such excess condemnation. The proposed taking of plaintiffs' property constitutes a taking of said property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, which these plaintiffs invoke.

Plaintiffs further say that the area of the property attempted to be taken by way of excess condemnation south of said twenty-five (25) foot strip is not uniform in depth and is laid out in accordance with no uniform rule, and that the lots embraced therein are of no uniform area, dimensions, or classification; that in some instances lands adjacent to the proposed improvement are omitted and in others lands are taken to unequal depths. From Main Street to Lawson Alley the property taken by way of excess condemnation is seventy-five and 40/100 (75.40) feet deep; from Lawson Alley to Sycamore Street the same is one hundred and twenty-four and 67/100 (124.67) feet in depth; from Sycamore Street to Broadway no property whatever is taken by way of excess condemnation, the property being left undisturbed in possession of present owners.

Between Broadway and McAllister Street and also between Lawrence and Pike Streets the property taken by way of excess condemnation is about seventy-five (75) feet in depth, but between McAllister Street and Lawrence Street no property whatever is so taken, the same being left in the possession of its present owners.

While said property so taken by way of excess condemnation is taken with the expectation and purpose on the part of the defendant that the increase in the value

of same, including plaintiffs' property and other properties similarly situated, which may accrue to the city by reason of the widening of Fifth Street, upon a resale will repay to the city the cost of making the said widening, yet the property upon the north side of Fifth Street between Main Street and Pike Street and the property immediately north thereof which is in its general character and condition, and for the most part in its improvement similar to that upon the south side of Fifth Street and will receive whatever benefits, if any, result from said street widening equally with the property on the south is nevertheless to be permitted to remain undisturbed in private ownership.

Plaintiffs say that the classification of the lands so subjected to excess condemnation is arbitrary and unjustly discriminates against plaintiff and others within the area of the proposed excess condemnation in favor of lands similarly situated and equally distant from the same, and that the plaintiffs are thereby denied the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States, which the plaintiffs invoke in this behalf.

Plaintiffs further say that by the laws of Ohio (General Code Section 3679) in order to warrant the appropriation of private property by municipal corporations it is necessary said corporation should by resolution define the purpose of the appropriation; that the defendant never has defined the purpose of this excess appropriation by resolution. That it is necessary under the laws of Ohio that the application for the assessment of compensation disclose the object proposed to be accomplished by such appropriation, but that the application filed by defendant in the Court of Common Pleas to appropriate said property fails to make any other disclosure of the object of said appropriation of the property in question than to say that the same is taken in furtherance of the public use of widening Fifth Street "by way of excess appropriation in accordance with the provision of Article XVIII, Section 10, of the Constitution of Ohio."

Plaintiffs say that notwithstanding the unconstitutionality, illegality, and insufficiency of the attempted appropriation the plaintiffs are, under the laws of Ohio and the decisions of its Supreme Court, without any adequate remedy at law that can be asserted either in response to said application to assess compensation or otherwise.

Plaintiffs further say that the said resolution so de-

claring the intent to appropriate said property was passed upon July 6th, 1927; that the property of these plaintiffs have been kept under appropriation proceedings, unconstitutional and invalid for the reasons hereinabove set forth, now for more than one year last past; that its marketability and availability for improvement and value have been thus impaired, and that the plaintiffs have suffered, are suffering and will suffer great injury, for all of which they are without adequate remedy at law, and their said injury is and will be irremediable unless the said appropriation acts herein complained of are enjoined by this honorable court.

Wherefore, these plaintiffs pray that the defendant be perpetually enjoined from proceeding with said excess condemnation or from appropriating any part of these plaintiffs' property except that actually desired for the widening of Fifth Street and within the 25 foot strip aforesaid, for a temporary injunction pending the hearing of this cause, and for all such other, further and general relief as plaintiffs are in equity entitled to receive.

Peck, Shaffer & Williams,
Attorneys for Plaintiffs.

State of Ohio, }
Hamilton County. } ss.

JAMES S. RICHARDS, being first duly sworn, deposes and says that he is one of the plaintiffs in the above entitled cause, and that the facts set forth in the foregoing petition are true.

James S. Richards.

Sworn to before me and subscribed in my presence this 6th day of November, 1928.
(Seal)

Alma Helm,
Notary Public, Hamilton County, Ohio.

40c due Notary.
File:
Hickenlooper, J.

ENTRY CORRECTING AMENDED BILL—Filed Nov. 26, 1928.

Upon application plaintiffs are granted leave to correct amended bill on page 1, second paragraph, line three by striking out "Sixth" and inserting "Fifth".

Hickenlooper, J.

Enter.

ANSWER TO AMENDED BILL—Filed Nov. 20, 1928.

Now comes defendant, the City of Cincinnati, and for answer to the amended bill of plaintiff, admits that it is a municipal corporation under the laws of Ohio; that the amount in controversy herein is in excess of three thousand dollars ($3,000.00), exclusive of interest and costs; that plaintiffs are the owners of a leasehold tract of land on the south side of Fifth Street (by error called Sixth Street in the amended bill) sixty-one (61) feet west of Pike Street, twenty-three (23) feet front extending south at right angles one hundred (100) feet to Buchanan Street, as described in the petition; that the City of Cincinnati on July 6, 1927, passed a resolution declaring its intent to appropriate for street widening purposes a strip of land twenty-five (25) feet wide adjacent to the south line of Fifth Street, from the east line of Main Street to the west line of Pike Street, including the north twenty-five (25) feet of said property of plaintiffs, and at the same time declared its intent to appropriate in excess of said twenty-five (25) foot strip a tract of land adjacent thereto, including all the residue of said property of plaintiffs, the said resolution being entitled as set forth in the petition; that in Section 3 of said resolution Council declared that said appropriation of said excess property is in furtherance of the widening of Fifth Street and necessary for the complete enjoyment and

preservation of said public use, that there after on March 21st, 1928, Council passed an ordinance to appropriate said property among other properties, in accordance with said resolution, stating that said excess appropriation was "for the more complete enjoyment and preservation of the benefits to accrue from said public use" and ordered the City Solicitor to apply to a court of competent jurisdiction to have a jury impaneled to make inquiry into and assess the compensation to be paid for the several parcels of land affected, including the property of plaintiff, as aforesaid; that thereafter on May 4, 1928, the City Solicitor filed an application in the common pleas court of Hamilton County, to wit: City vs. Smythe, et al, No. A-8538, and caused notice to be issued to the various property holders, including plaintiffs, and that the hearing at the time of the filing of petition herein had been set for September 17, 1928.

Defendant further admits that the south seventy-five (75) feet of the property of plaintiffs as appropriated by defendant is not within the limitation of the twenty-five (25) foot strip desired for the widening of Fifth Street; that the said property is in excess of that actually to be occupied by said improvement of Fifth Street; that the charter of the City of Cincinnati makes no reference to the subject of condemnation or excess condemnation; that the excess property appropriated south of the twenty-five (25) foot strip is not uniform in depth; that the area of said excess appropriation is as stated in the amended bill; that no property on the north side of Fifth Street has been appropriated.

Defendant denies that said property is not taken for any public use; and that no public use is stated in the resolution and ordinance providing for said appropriation; that the action of defendant in attempting the appropriation thereof is a mere speculation upon an anticipated increase in the value of the properties adjacent to said improvement when made; that the proposed taking of this property of plaintiffs constitutes a taking of the said property without due process of law, contrary to the 14th Amendment of the Constitution of the United States; that the excess property is laid out in accordance with no uniform rule; that the classification of the lands subjected to excess condemnation is arbitrary and unjustly discriminates against plaintiff and others; that plaintiff is by said proceedings denied the equal protection of the laws; that said proceedings are contrary to the laws of Ohio; that plaintiffs have suffered, are suffering and

will suffer great injury by reason of the proceedings of the City of Cincinnati by way of appropriation or excess appropriation.

Further answering, defendant says that the two squares of Fifth Street west of Main Street, to-wit, Government Square and Fountain Square, are in the heart of the City of Cincinnati and that a large amount of traffic comes into said squares and proceeds eastwardly over Fifth Street. The width of Fifth Street in the two squares west of Main Street is one hundred and thirty (130) feet from property line to property line; the width of Fifth Street east of Main Street is sixty-six (66) feet, from property line to property line. Defendant says that it proposed to widen Fifth Street from Main Street eastwardly to Pike Street to a total width of ninety-one (91) feet by appropriating twenty-five (25) feet on the south side of Fifth Street for street purposes.

Defendant says that after said Fifth Street from Main Street to Pike Street should have been improved to its new width, it will be the widest and most imposing of the city's streets in the present main business district, and will connect with other important existing and contemplated highways. The buildings at present existing along said south side of Fifth Street, with the exception of the Masonic Temple from Sycamore Street to Broadway, and the Font Bonne Building from McAllister Street to Lawrence Street (which said buildings are new and imposing buildings and have been set back to conform to the proposed new street with) are almost without exception of great age and not capable of being used or remodeled in a manner suited to the proposed broad highway, particularly in view of the fact that nearly all the parcels of real estate along said south side of Fifth Street from Main Street to Pike Street are of small size and frontage.

Defendant says that it has appropriated in their entirely all the parcels fronting on Fifth Street from Main Street to Pike Street with the exception of said Masonic Temple property and Font Bonne property, heretofore referred to, and in addition, three tracts fronting on the east side of Broadway lying within one hundred (100) feet of Fifth Street, and two tracts on the west side of Pike Street, lying within one hundred (100) feet of the existing south line of Fifth Street. Defendant says that in so doing, it is operating under the provisions of Section 10 of Article XVIII of the Constitution of Ohio, as follows:

"Section 10. A municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made."

Defendant says that by applying the principle of excess condemnation as herein proposed, it will be able to further the appropriate development of Fifth Street from Main Street to Pike Street as a notable highway in the City of Cincinnati. Defendant says that by using the powers conferred by said Section 10 of Article XVIII of the Constitution of Ohio, it will be able after said widening has become effective, to dispose of lots of land of such size and subject to such restrictions as shall be best suited to the new highway.

Defendant says that plaintiffs' lot has a width of but twenty-three (23) feet with a very old two-story house thereon built to the street property line as shown by the blue print attached hereto marked "Exhibit 'A'." Defendant says that by taking only the north twenty-five (25) feet of plaintiffs' property as directly required for street purposes, defendant would be compelled to pay plaintiffs for said twenty-five (25) foot strip not only the value of said strip but a large sum by way of damage done to the residue of the property inasmuch as the entire buildings would have to be destroyed and the lot left to plaintiffs would have dimensions of only twenty-three (23) by seventy-five (75) feet.

Defendant says that said lot of twenty-three (23) feet by seventy-five (75) feet which would be left to plaintiffs, if the city took only the strip directly necessary for street purposes, will be incapable of suitable development by itself to produce reasonable income on its market value, which market value is purely speculative and founded on the hope that some corporation or individual will at some time in the future find it necessary or profitable to buy out plaintiffs and a sufficient number of their neighbors to provide an adequate building site.

Defendant further says that by means of its control of the said parcels appropriated between Lawrence Street and Pike Street, it will be able to assist in the appropriate development of said territory, whereas, if the said development of said territory, whereas, if the said development is left to the hazard of private bar-

gaining involving a large number of private interests, the appropriate development of said tract from Lawrence Street to Pike Street is likely to be delayed for a long period of time or made impossible.

Defendant further says that the present reasonable market value of the tract described in the petition under the conditions at present existing is the sum of twenty-eight thousand eight hundred ($28,800.00) dollars; that if the city appropriated only the twenty-five (25) foot strip, the compensation payable to the owners, including damages to residue would be the sum of fifteen thousand dollars ($15,000.00). Defendants say that after the effectuation of the proposed widening of Fifth Street, the lot remaining would have a market value in excess of the difference between said total value of twenty-eight thousand eight hundred ($28,800.00) dollars and said sum of fifteen thousand ($15,000.00) dollars, representing the value of the twenty-five (25) foot strip with residue damages. The increase in said market value will be due entirely to the new conditions created by the widening of Fifth Street and the proposed appropriation.

Defendant says that by paying plaintiffs the reasonable value of their said property, as described in the petition, plaintiffs will be deprived of no constitutional rights nor of any other right except the right to delay or make imposible the appropriate development of said property between Lawrence Street and Pike Street in accordance with the needs of business, industry and the public.

In conclusion the City of Cincinnati expects two things in connection with the application of the principle of excess condemnation of plaintiffs' property and to other property along the south side of Fifth Street from Main Street to Pike Street, to-wit:

1st. That the city will be able to further the appropriate development of the south side of Fifth Street, between Main and Pike Streets by using or disposing of its excess in tracts of such size and with such restrictions as will inure to the public advantage.

2nd. That the increase in value of plaintiffs' property and other properties which may accrue by reason of the improvement contemplated by the city will pay in part the very heavy expense to which the city will be put in effecting the improvement.

Answer to Amended Bill

Wherefore, defendant prays that the petition of plaintiffs may be dismissed at their costs and that defendant may be hence without day.

City of Cincinnati,
By John D. Ellis,
City Solicitor.
By Ed F. Alexander,
Assistant City Solicitor.

State of Ohio, }
County of Hamilton. } ss.

JOHN D. ELLIS, being first duly sworn, says that he is the City Solicitor of the City of Cincinnati, and that the facts set forth in the foregoing answer are true, as he verily believes.

John D. Ellis.

Sworn to and subscribed to before me this 20th day of November, A. D. 1928.
(Seal)

Bess Argo,
Notary Public, Hamilton County, Ohio.

STATEMENT OF EVIDENCE—Filed Jan. 7, 1929.
See page 11.

OPINION—Filed Nov. 28, 1928. See page 26.

FINAL DECREE—Filed Nov. 26, 1928.

This cause came on to be heard upon the amended bill and answer thereto and upon the evidence and argument of counsel, and was submitted to the Court and thereupon the Court do find for the plaintiff.

Wherefore, it is ordered, adjudged and decreed that the defendant, The City of Cincinnati, be and hereby is perpetually enjoined from appropriating under its Resolution of July 6, 1927, and its Ordinance of March 21, 1928, of plaintiffs' property on the south side of Fifth Street sixty one (61) feet west of Pike Street, twenty three (23) feet front and extending south at right angles one hundred (100) feet to Buchanan Street that part thereof lying south of a line drawn parallel with and twenty five (25) feet south of the present south line of Fifth Street, and that the title of the plaintiffs to so much of their said property as lies south of said line be and the same hereby is quieted as against the appropriation attempted to be made by defendant by the Resolution and Ordinance aforesaid, and it is further ordered that the plaintiffs recover from the defendant their costs herein, to all of which the defendant excepts.

Enter.

Smith Hickenlooper,
District Judge.

PETITION FOR APPEAL—Filed Jan. 7, 1929. Harry F. Rabe, Clerk.

The above named, the city of Cincinnati feeling aggrieved by the decree rendered and entered in the above entitled cause on the day of November, A. D. 1928 does hereby appeal from said decree to the Circuit Court of Appeals for the sixth circuit for the reason set forth in the assignment of error filed herewith, and petitioner prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings, and documents upon which said decree was based, duly authenticated be sent to the United States Circuit Court of Appeals for the sixth circuit, under the rules of such court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of it be made.

The City of Cincinnati,
John D. Ellis,
City Solicitor.

Appeal allowed upon giving bond as required by law for the sum of $250.00.

Smith Hickenlooper,
Judge.

ASSIGNMENT OF ERRORS—Filed Jan. 7, 1929.

Now comes the defendant in the above entitled cause and files the following Assignment of Errors upon which it will rely upon its prosecution of the appeal in the above entitled cause, from the decree made by this Honorable Court on the 26th day of November, 1928.

Assignment of Errors

I.

That the United States District Court for the Southern District of Ohio, Western Division, erred in its decision and judgment as follows:

The city of Cincinnati having filed an application in the Court of Common Pleas, Hamilton County, Ohio, to assess compensation for the appropriation of certain parcels of real estate abutting on or near to the south side of Fifth Street in said city, partly for street widening purposes and partly by way of excess condemnation, including the lot of plaintiff, appellee, fronting twenty-three (23) feet on the south side of Fifth Street by one-hundred (100) feet in depth, of which the north twenty-five (25) feet were to be taken for street widening purposes and the remaining south seventy-five (75) feet by way of excess condemnation in pursuance of Section 10, Article XVIII of the Constitution of Ohio, the said District Court enjoined such appropriation as to said south seventy-five (75) feet of plaintiff appellee's property, on the ground that by reason of such excess condemnation, defendant appellant would be depriving plaintiff of his property without due process of law, contrary to the provisions of Section 1 of Article XIV of the amendments to the Constitution of the United States.

Wherefore appellant prays that said decree be reversed and that the said District Court of the Southern District of Ohio, Western Division, be ordered to enter a decree reversing the said decision in said cause.

John D. Ellis,
City Solicitor,
Ed F. Alexander,
Assistant City Solicitor,
Attorneys for Appellant.

CITATION—Filed Jan. 7, 1929.

UNITED STATES CIRCUIT COURT OF APPEALS.
For the Sixth Circuit

To James S. Richards, and Paschal L. Richards—
Greeting:

You Are Hereby Cited And Admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said Circuit, within thirty days from the date hereof, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of Ohio, wherein the city of Cincinnati, a municipal corporation is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William Howard Taft, Chief Justice of the United States, this 7th day of January in the year of our Lord one thousand nine hundred and twenty-nine and of the Independence of the United States of America the one hundred and fifty-third.

Smith Hickenlooper,
Judge, United States District Court,
Southern District of Ohio.

State of .....)
County of .....) ss.

On this ..... day of ....., A. D. 192—, personally appeared before me, a Notary Public in and for said County, ... and made oath that he delivered a copy of within citation to
.....
.....
.....

Sworn to and subscribed before me this .....
day of ....., 192
.....
.....
.....

Service of the foregoing citation waived and appearance entered.

Peck, Shaffer & Williams,
Attorneys for James S. Richards
and Paschal L. Richards.

BOND ON WRIT OF ERROR OR APPEAL
—Filed Jan. 7, 1928.

Know all Men by these Presents

That we, The City of Cincinnati, a municipal corporation organized and existing under the laws of Ohio, as principal and The Aetna Casualty and Surety Company as sureties, are held and firmly bound unto James S. Richards, and Paschal L. Richards in the full and just sum of Two Hundred & 00/100 ($200.00) Dollars, to be paid to the said James S. Richards, and Paschal L. Richards, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 7th day of January in the year of our Lord one thousand nine hundred and twenty-nine.

Whereas, lately at a regular term of the District Court of the United States for the Southern District of Ohio, Western Division, in a suit depending in said Court between James S. Richards and Paschal L. Richards vs. The City of Cincinnati, a municipal corporation organized and existing under the laws of Ohio, a decree was rendered against the said City of Cincinnati, a municipal corporation, organized and existing under the laws of Ohio and the said City of Cincinnati, a municipal corporation organized and existing under the laws of Ohio having obtained an appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said James S. Richards and Paschal L. Richards citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said circuit, on the Sixth day of February next.

Now, The Condition of the Above Obligation is Such that, if the said City of Cincinnati, a municipal corporation organized and existing under the laws of Ohio shall prosecute said appeal to effect, and answer all damages and cost if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

.....

.....

Bond on Writ of Error or Appeal

The City of Cincinnati, [Seal]
by Ed F. Alexander [Seal]
Asst. Solicitor [Seal]
The Aetna Casualty and Surety Company,
By John B. Sauten,
Attorney in Fact.

Approved by—
Smith Hickenlooper,
United States District Judge,
Southern District of Ohio.

UNITED STATES DISTRICT COURT

Southern District of Ohio
Western Division.

Llewellyn B. Reakirt, Plaintiff, vs. The City of Cincinnati, a municipal corporation under the laws of Ohio, Defendant.	No. 557.

AMENDED BILL—Filed Nov. 6, 1928, Harry F. Rabe, Clerk.

Now comes the plaintiff and says that the defendant is a municipal corporation under the laws of Ohio; that the amount in controversy herein is in excess of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs, and that this controversy arises under and upon the Fourteenth Amendment to the Constitution of the United States of America, upon which plaintiff bases this action, and that the jurisdiction of this federal court is invoked upon that ground.

Amended Bill

Plaintiff says that he is the owner in fee simple of a tract of land in the City of Cincinnati, Hamilton County, Ohio; at the southwest corner of Fifth and Sycamore Streets, being one hundred and thirty eight feet and eight (138.8) tenths in front on Fifth Street and one hundred and fifty (150) feet on Sycamore Street and running back between parallel lines; that the same is a vacant lot except for the presence of a small building about fifteen feet square used as a gasoline filling station near the corner of Fifth and Sycamore Streets, located about thirty feet distant from each of those streets; that the defendant, the City of Cincinnati, on July 6th, 1927, passed a certain resolution declaring its intent to appropriate for street widening purposes a strip of land 25 feet wide adjacent to the south line of Fifth Street, easterly from the east line of Main Street to the west line of Pike street, a distance of about five blocks intersected (from west to east) by Lawson Alley, Sycamore Street, Broadway, McAllister Street, including the north 25 feet of plaintiff's said tract, for the purpose of widening said Fifth Street 25 feet.

At the same time defendant declared its intent to appropriate in excess of the above described property necessary for said street widening a tract of land next adjacent thereto, and which includes the residue of the aforesaid property of plaintiff, said resolution being entitled, "A resolution declaring the intention to appropriate property for street widening purposes and in furtherance of said purpose to appropriate property in excess of that actually to be occupied by said improvement."

By Section 3 of said resolution the Council declared that said appropriation of said excess property is in furtherance of the widening of Fifth Street and necessary for the complete enjoyment and preservation of said public use, but no public use of said excess is specified or stated.

Thereafter, upon March 21st, 1928, the defendant by its Council passed an ordinance to appropriate and did attempt to appropriate said property in accordance with said resolution, stating that said excess condemnation was "for the more complete enjoyment and preservation of the benefits to accrue from said public use," and did order the City Solicitor to apply to a court of competent jurisdiction to have a jury impaneled to make inquiry into and assess the compensation to be paid for the several parcels of

land effected, including the property of this plaintiff, as aforesaid, and thereupon the said City Solicitor did on May 4th, 1928, file an application in the Court of Common Pleas of Hamilton County, Ohio, in a case entitled The City of Cincinnati vs. Sarah Smythe, et al., being case numbered A. 8538 on the docket of said court, to assess compensation, and did cause notice to be issued to the various property holders, including this plaintiff, thereof and has cause the said case to be set down for trial on or about the 17th day of September, 1928.

The property above described sought to be appropriated from this paintiff by way of excess condemnation, outside of and beyond the twenty five foot strip actually to be used for said street widening, consists of several lots and parts of lots of land aggregating an area rectangular in shape fronting 124.67 feet on Sycamore and 138.81 feet on Fifth Street when widened as proposed and is level and lies within and near the center of the business district of Cincinnati, is of great value and available for the building of a buiding or buildings of the highest class and character. Plaintiff says that the said property is not taken for any public use; that the said resolution declaring the intent of the city expressly recites that the same is not necessary for said street widening, and that the same is "in excess of that actually to be occupied by said improvement;" that no public use whatsoever to be made of said property has been stated by the defendant, and that the action of the defendant in attempting the appropriation thereof is a mere specualtion upon an anticipated increase in the value of the properties adjacent to said improvement when made, and said property is taken for the purpose and with the design of reselling the same at a profit to private individuals to be used for private purposes, and no use of said property by or for the public is intended or contemplated. The Charter of the City of Cincinnati is silent upon and does not purport to authorize any such excess condemnation.

The proposed taking of plaintiff's property constitutes a taking of said property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, which this plaintiff invokes.

Plaintiff further says that the area of the property attempted to be taken by way of excess condemnation south of said twenty-five (25) foot strip is not uniform in depth and is laid out in accordance with no uniform rule, and that the lots embraces therein are of no uniform area, dimensions, or classification; that in some instances lands

adjacent to the proposed improvement are omitted and in others lands are taken to unequal depths. From Main Street to Lawson Alley the property taken by way of excess condemnation is seventy-five and 40/100 (75.40) feet deep; from Lawson Alley to Sycamore Street the same is one hundred and twenty-four and 67/100 (124.67) feet in depth; from Sycamore Street to Broadway no property whatever is taken by way of excess condemnation, the property being left undisturbed in possession of present owners.

Between Broadway and McAllister Street and also between Lawrence and Pike Streets the property taken by way of excess condemnation is about seventy-five (75) fet in depth, but between McAllister Street and Lawrence Street no property whatever is so taken, the same being left in the possession of its present owners.

While said property so taken by way of excess condemnation is taken with the expectation and purpose on the part of the defendant that the increase in the value of same, including plaintiff's property and other properties similarly situated, which may accrue to the city by reason of the widening of Fifth Street, upon a resale will rtpay to the city the cost of making the said widening, yet the property upon the north side of Fifth Street between Main Street and Pike Street and the property immediately north thereof which is in its general character and condition, and for the most part in its improvement similar to that upon the south side of Fifth Street and will receive whatever benefits, if any, result from said street widening equally with the property on the south is nevertheless to be permitted to remain undisturbed in private ownership.

Plaintiff says that the classification of the lands so subjected to excess condemnation is arbitrary and unjustly discriminates against plaintiff and others within the area of the proposed excess condemnation in favor of lands similarly situated and equally distant from the same, and that the plaintiff is thereby denied the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States, which the plaintiff invokes in this behalf.

Plaintiff further says that by the laws of Ohio (General Code Section 3679) in order to warrant the appropriation of private property by municipal corporations it is necessary said corporation should by resolution define the purpose of the appropriation; that the defendant never has defined the purpose of this excess appropriation by resolution. That it is necessary under the

laws of Ohio that the application for the assessment of compensation disclose the object proposed to be accomplished by such appropriation, but that the application filed by defendant in the Court of Common Pleas to appropriate said property fails to make any other disclosure of the object of said appropriation of the property in question than to say that the same is taken in furtherance of the public use of widening Fifth Street "by way of excess appropriation in accordance with the provision of Article XVIII, Section 10, of the Constitution of Ohio."

Plaintiff says that notwithstanding the unconstitutionality, illegality, and insufficiency of the attempted appropriation the plaintiff is, under the laws of Ohio and the decisions of its Supreme Court, without any adequate remedy at law that can be asserted either in response to said application to assess compensation or otherwise.

Plaintiff fuurther says that the said resolution so declaring the intent to appropriate said property was passed upon July 6th, 1927; that the property of this plaintiff has been kept under appropriation proceedings, unconstitutional and invalid for the reasons hereinabove set forth, now for more than one year last past; that its marketability and availability for improvement and value have been and are being thus impaired and that the plaintiff has suffered, is suffering and will suffer great injury, for all of which he is without adequate remedy at law, and his said injury is and will be irremediable unless the said appropriation acts herein complained of are enjoined by this honorable court.

Wherefore, the plaintiff prays that the defendant be perpetually enjoined from proceeding with said excess condemnation or from appropriating any part of this plaintiff's property except that actually desired for the widening of Fifth Street and within the 25 foot strip aforesaid, for a temporary injunction pending the hearing of this cause, and for all such other, further and general relief as plaintiff is in equity entitled to receive.

Peck, Schaffer & Williams, and
Milton Sagler,
Attorneys for Plaintiff.

State of Ohio, }
Hamilton County. } ss.

Llewellyn B. Reakirt, being first duly sworn, deposes and says that he is plaintiff in the above entitled cause

and that the facts set forth in the foregoing petition are true.

Llewellyn B. Reakirt.

Sworn to before me and subscribed in my presence this 5th day of November, 1928.

Alma Helm,
Notary Public, Hamilton County, Ohio.

(Seal)
40c due Notary
File:
Hickenlooper, J.

STIPULATION—Filed Nov. 10, 1928.

It is stipulated that the following correction may be made on the face of the bill:

Page Four, second whole paragraph, line four, change "width" to "depth";

Fifth line from the end of paragraph, change "wide" to "depth";

Third line from the end of same paragraph change "width" to "depth";

Same page, third whole paragraph, change "width" to "depth."

Peck, Shaffer & Williams,
Attorneys for plaintiff.
John D. Ellis,
Attorneys for defendant.

Approved
Hickenlooper, J.

ANSWER TO AMENDED BILL—Filed Nov. 20, 1928.

Now comes defendant, the city of Cincinnati, and for answer to the plaintiff's amended bill, admits that it is a municipal corporation under the laws of Ohio; that the amount in controversy herein is in excess of three thousand dollars ($3,000.00), exclusive of interest and costs; that plaintiff is the owner in fee simple of a tract of land at the southwest corner of Fifth and Sycamore Streets, being one hundred and thirty-eight and 8/10 (138.8) feet in front on Fifth Street and one hundred and fifty (150) feet on Sycamore street and running back between parallel lines, as described in the amended bill; that the sole building on said lot is a gasoline filling station; that the city of Cincinnati on July 6, 1927, passed a resolution declaring its intent to appropriate for street widening purposes a strip of land 25 feet wide adjacent to the south line of Fifth Street, easterly from the east line of Main street to the west line of Pike street, including the north twenty-five (25) feet of said property of plaintiff and at the same time declared its intent to appropriate in excess of said 25 foot strip a tract of land adjacent thereto including all the residue of said property of plaintiff, the said resolution being entitled as set forth in the petition; that in Section 3 of said resolution counsel declared that said appropriation of said excess property is in furtherance of the widening of Fifth street and necessary for the complete enjoyment and preservation of said public use; that thereafter on March 21, 1928, council passed an ordinance to appropriate said property among other properties, in accordance with said resolution, stating that said excess appropriation was "for the more complete enjoyment and preservation of the benefits to accrue from said public use" and ordered the city solicitor to apply to a court of competent jurisdiction to have a jury impaneled to make inquiry into and assess the compensation to be paid for the several parcels of land affected, including the property of plaintiff, as aforesaid; that thereafter on May 4, 1928, the city solicitor filed an application in the common pleas court of Hamilton County, to wit: City vs. Smythe, et al., No. A-8538, and caused notice to be issued to the various property holders, including plaintiff, and that the hearing at the time of the filing of petition herein had been set for September 17, 1928.

Defendant further admits that the south one hundred and twenty four and 67/100 (124.67) feet of the property of plaintiffs as appropriated by defendant is not within

the limitation of the 25 foot strip desired for the widening of Fifth Street; that the said property is level and near the center of the business district of Cincinnati; that it is of great value and available for the building of a high class office building; that the said property is in excess of that actually to be occupied by said improvement of Fifth Street; that the charter of the city of Cincinnati makes no reference to the subject of condemnation or excess condemnation; that the excess property appropriated south of the twenty five foot strip is not uniform in depth; that the area of said excess appropriation is as stated in the amended bill; that no property on the north side of Fifth Street has been appropriated.

Defendant denies that said property is not taken for any public use; and that no public use is stated in the resolution and ordinance providing for said appropriation; that the action of defendant in attempting the appropriation thereof is a mere speculation upon an anticipated increase in the value of the properties adjacent to said improvement when made; that the proposed taking of this property of plaintiff constitutes a taking of the said property without due process of law, contrary to the 14th Amendment of the Constitution of the United States; that the excess property is laid out in accordance with no uniform rule; that the classification of the lands subjected to excess condemnation is arbitrarily and unjustly discriminates against plaintiff and others; that plaintiff is by said proceedings denied the equal protection of the laws; that said proceedings are contrary to the laws of Ohio; that plaintiff has suffered, is suffering and will suffer great injury by reason of the proceedings of the city of Cincinnati by way of appropriation or excess appropriation.

Further answering, defendant says that the two squares of Fifth street west of Main street, to wit: Government Square and Fountain Square, are in the heart of the city of Cincinnati and that a large amount of traffic comes into said squares and proceeds eastwardly over Fifth street. The width of Fifth street in the two squares west of Main street is 130 feet from property line to property line; the width of Fifth street east of Main street is 66 feet from property line to property line. Defendant says that it proposes to widen Fifth street from Main street eastwardly to Pike street to a total width of 91 feet by appropriating 25 feet on the south side of First street for street purposes.

Defendant says that after said Fifth street from

Main street to Pike street shall have been improved to its new width, it will be the widest and most imposing of the city's streets in the present main business district, and will connect with other important existing and contemplated highways. The buildings at present existing along said south side of Fifth street, with the exception of the Masonic Temple from Sycamore street to Broadway, and the Fontbonne Building from McAllister street to Lawrence street (which said buildings are new and imposing buildings and have been set back to conform to the proposed new street width) are almost without exception of great age and not capable of being used or remodeled in a manner suited to the proposed broad highway, particularly in view of the fact that nearly all the parcels of real estate along said south side of Fifth street from Main street to Pike street are of small size and frontage.

Defendant says that it has appropriated in their entirety all the parcels fronting on Fifth street from Main street to Pike street with the exception of said Masonic Temple property and Fontbonne property, heretofore referred to, and in addition, three tracts fronting on the east side of Broadway lying within 100 feet of Fifth street, and two tracts on the west side of Pike street, lying within 100 feet of the existing south line of Fifth street. Defendant says that in so doing, it is operating under the provisions of Section 10 of Article XVIII of the Constitution of Ohio, as follows:

> "Section 10. A municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made."

Defendant says that by applying the principle of excess condemnation as herein proposed, it will be able to further the appropriate development of Fifth street from Main street to Pike street as a notable highway in the city of Cincinnati. Defendant says that by using the powers conferred by said Section 10 of Article XVIII of the Constitution of Ohio, it will be able after said widening has become effective, to dispose of lots of land of such size and subject to such restrictions as shall be best suited to the new highway.

Answer to Amended Bill

Defendant says that the tract of which plaintiff owns the fee simple title is part of the block from Main street to Sycamore street; that after the affectuation of the proposed widening of Fifth street said block will be highly desirable as a location for large buildings for important business and other purposes, provided that sites of satisfactory dimensions can be provided; that by its control of the said entire block and by imposing suitable restrictions in case of sales of parts thereof, the defendant will be able to further the development of said Fifth street in a manner befitting the new improvement.

Defendant further says that the present reasonable value in full of the real estate described in plaintiff's petition is approximately the sum of $555,000; that the value of the 25 foot strip of said real estate is the sum of approximately $92,000. Defendant says that after the effectuation of the proposed widening of Fifth street, the residue of said real estate will have a value not less than the value of the entire tract at the present time. By reason whereof defendant will by appropriating plaintiff's property in its entirety be able to pay part, if not all, the expense of the street widening in front of plaintiff's property out of the increased value which the city will confer on the residue of plaintiff's real estate by reason of the improvement, and the proposed appropriation.

Defendant further says that plaintiff's interest in the said real estate is a mere ground rest investment; that paintiff had executed a perpetual lease of the same whereby plaintiff is to receive a rental of $18,000 per year for the first ten years, $24,000 per year for the second ten years and $30,000 per year thereafter with a privilege of purchase at $600,000 at the end of thirty years; that the present value of plaintiff's investment is much less than the total present value of the said real estate.

Defendant says that by paying plaintiff the value of his investment in the real estate described in the petition, plaintiff will be deprived of no constitutional right or any other right.

In conclusion the city of Cincinnati expects two things in connection with the application of the principle of excess condemnation to plaintiff's property and to other property along the south side of Fifth street from Main street to Pike street, to wit:

1st. That the city will be able to further the appropriate development of the south side of Fifth street, between Main and Pike streets by using or disposing of its excess in tracts of such size and with

such restrictions as will inure to the public advantage.

2nd. That the increase in value of plaintiff's property and other properties which may accrue by reason of the improvement contemplated by the city will pay in part the very heavy expense to which the city will be put in effectuating the improvement.

Wherefore, defendant prays that the petition of plaintiff's may be dismissed at their costs and that defendant may go hence without day.

The City of Cincinnati,
By John D. Ellis,
City Solicitor,
By Ed F. Alexander,
Assistant City Solicitor.

State of Ohio, }
County of Hamilton. } ss.

John D. Ellis, being first duly sworn, says that he is the city solicitor of the city of Cincinnati, and that the facts set forth in the foregoing answer are true, as he verily believes.

John D. Ellis.

Sworn to and subscribed to before me this 20th day of November, A. D. 1928.

Bess Argo,
Notary Public in and for Hamilton County, Ohio.

(Seal)

STATEMENT OF EVIDENCE—Filed Jan. 7, 1929.

See page 11.

OPINION—Filed Nov. 28, 1928.
See page 26.

FINAL DECREE—Filed Nov. 26, 1928.

This cause came on to be heard upon the amended bill and answer thereto and the evidence and argument of counsel and was submitted to the Court and thereupon the Court do find for the plaintiff.

Wherefore, it is ordered, adjudged and decreed that the defendant, the City of Cincinnati, be and hereby is perpetually enjoined from appropriating under its Resolution of July 6, 1927, and its Ordinance of March 21, 1928, any part of plaintiff's property at the southwest corner of Fifth and Sycamore Streets in Cincinnati, Hamilton County, Ohio, south of a line drawn parallel with and twenty five (25) feet south of the present south line of Fifth Street, and that the title of the plaintiff to so much of its said property as lies south of said line be and hereby is quieted as against the apporpriation attempted to be made by defendant by the Resolution and Ordinance aforesaid, and it is further ordered that the plaintiff recover from the defendant his costs herein. To all of which the defendant excepts.

Enter.

Smith Hickenlooper,
District Judge.

PETITION FOR APPEAL—Filed Jan. 7, 1929. Harry F. Rabe, Clerk.

The above named, the city of Cincinnati feeling aggrieved by the decree rendered and entered in the above entitled cause on the day of November, A. D. 1928 does hereby appeal from said decree to the Circuit Court of Appeals for the sixth circuit for the reason set forth in the assignment of error filed herewith, and petitioner prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings, and documents upon which said decree was based, duly authenticated be sent to the United States Circuit Court of Appeals for the sixth circuit, under the rules of such court in such cases made and provided.

And your petitioner further prays, that the proper order relating to the required security to be required of it be made.

The City of Cincinnati,
John D. Ellis,
City Solicitor.

Appeal allowed upon giving bond as required by law for the sum of $250.00.

Smith Hickenlooper,
Judge.

ASSIGNMENT OF ERRORS—Filed Jan. 7, 1929.

Now comes the defendant in the above entitled cause and files the following Assignment of Errors upon which it will rely upon its prosecution of the appeal in the above entitled cause, from the decree made by this Honorable Court on the 26th day of Novmber, 1928.

Assignment of Errors

I.

That the United States District Court for the Southern District of Ohio, Western Division, erred in its decision and judgment as follows:

The city of Cincinnati having filed an application in the Court of Common Pleas, Hamilton County, Ohio, to assess compensation for the appropriation of certain parcels of real estate abutting on or near to the south side of Fifth Street in said city, partly for street widening purposes and partly by way of excess condemnation, including the lot of plaintiff appellee, fronting one hundred and thirty-eight and eight-tenths (138.8) feet on the south side of Fifth Street by one hundred and fifty (150) feet on the west side of Sycamore Street, of which the north twenty-five (25) feet were to be taken for street widening purposes and the remaining south one hundred and twenty-five (125) feet by way of excess condemnation, in pursuance of Section 10, Article XVIII of the Constitution of Ohio, the said District Court enjoined such appropriation as to the said south one hundred and twenty-five (125) feet of plaintiff appellee's property, on the ground that by reason of such excess condemnation, defendant appellant would be depriving plaintiff of his property without due process of law, contrary to the provisions of Section 1 of Article XIV of the amendments to the Constitution of the United States.

Wherefore appellant prays that said decree be reversed and that the said District Court of the Southern District of Ohio, Western Division, be ordered to enter a decree reversing the said decision in said cause.

John D. Ellis,
City Solicitor,
Ed F. Alexander,
Assistant City Solicitor,
Attorneys for Appellant.

CITATION—Filed Jan. 7, 1929.

UNITED STATES CIRCUIT COURT OF APPEALS
For the Sixth Circuit

To Llewellyn B. Reakirt—Greeting:

You Are Hereby Cited And Admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said Circuit, within thirty days from the date hereof, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of Ohio, wherein the city of Cincinnati, a municipal corporation is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William Howard Taft, Chief Justice of the United States, this 7th day of January in the year of our Lord one thousand nine hundred and twenty-nine and of the Independence of the United States of America the one hundred and fifty-third.

Smith Hickenlooper,
Judge, United States District Court,
Southern District of Ohio.

BOND ON WRIT OF ERROR OR APPEAL—Filed Jan. 7, 1929.

Know All Men by These Presents

That we, The City of Cincinnati, a municipal corporation organized and existing under the laws of Ohio, as principal and The Aetna Casualty and Surety Company, as sureties, are held and firmly bound unto Llewellyn B.

Bond on Writ of Error Appeal

Reakirt in the full and just sum of Two Hundred & 00/100 ($200.00) Dollars, to be paid to the said Llewellyn B. Reakirt certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, or heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 7th day of January, in the year of our Lord one thousand nine hundred and twenty-nine.

Whereas, lately at a regular term of the District Court of the United States for the Southern District of Ohio, Western Division, in a suit depending in said Court between Llewellyn B. Reakirt and The City of Cincinnati, a municipal corporation organized and existing under the laws of Ohio, a decree was rendered against the said The City of Cincinnati, a municipal corporation organized and existing under the laws of Ohio, and the said The City of Cincinnati, a municipal corporation organized and existing under the laws of Ohio, having obtained an appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said Llewellyn B. Reakirt citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said circuit, on the 6th day of February next.

Now, The Condition of the Above Obligation is Such that, if the said The City of Cincinnati a municipal corporation organized and existing under the laws of Ohio, shall prosecute it to effect, and answer all damages and cost if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

.....

.....

Approved by—
Smith Hickenlooper,
United States District Judge,
Southern District of Ohio.

The City of Cincinnati [Seal]
by Ed F. Alexander [Seal]
Assistant Solicitor [Seal]
The Aetna Casualty and Surety Company,
By John B. Sauten,
Attorney in Fact.

(Seal)

STIPULATION AS TO RECORD IN NOS. 555, 556 AND 557—Filed Jan. 7, 1929.

It is agreed by and between counsel for plaintiffs and counsel for defendant that the appeals in the foregoing causes may be heard together and that one record shall be prepared for all said appeals, to consist of the following:

1. Amended Bill in Cause No. 555; 1a stipulation;
2. Answer to Amended Bill in Cause No. 555;
3. Amended Bill in Cause No. 556; 3a stipulation;
4. Answer to Amended Bill in Cause No. 556; excepting plat; but with reference;
5. Amended Bill in Cause No. 557; 5a stipulation;
6. Answer to Amended Bill in Cause No. 557; excepting plat but with reference;

6a. Entry Nov. 26 '28 correcting amended bill in No. 556;

7. Narrative Statement of Evidence with all;

Exhibits as follows:

Plaintiffs Exhibits:

No. 1, City Appropriation plat;
No. 2, Lease, Reakirt to Friedlander;
Nos. 3, 4, 5, Stipulations as to evidence;
Nos. 6 to 14 inclusive, Photographs showing North side of Fifth Street.

Defendant's Exhibits;

No. A, Council Resolution of July 6, 1927;
No. B, Council Ordinance No. 155-1928;
Nos. C to O inclusive, Photographs showing south side of Fifth Street;
No. P, Plat of Planning Commission, March 5, 1925;
No. Q, Alternate Routes for Fifth Street Extension;
No. R, Plat, Third Street-Columbia Avenue-Torrence Road Boulevard;
No. S, Council Ordinance No. 318-1927;
No. T, Council Resolution of September 1, 1926;
No. T-1, Abstract of votes on Referendum;

8. Opinion of District Court Judge;
9. Judgment Entry in Cause No. 555;
10. Judgment Entry in Cause No. 556;
11. Judgment Entry in Cause No. 557;
12. Petition for Appeal in Cause No. 555;
13. Assignment of Errors in Cause No. 555;
14. Petition for Appeal in Cause No. 556;

Stipulation as to Record, etc.

15. Assignment of Errors in Cause No. 556;
16. Petition for Appeal in Cause No 557;
17. Assignment of Errors in Cause No. 557;
18. This Stipulation.

Peck, Shaffer & Williams,
Attorneys for Plaintiffs,
John D. Ellis,
City Solicitor.
Ed. F. Alexander,
Assistant Solicitor,
Attorneys for Defendant.

PRAECIPE FOR RECORD IN NOS. 555, 556 AND 557
—Filed Jan. 7, 1929.

To The Clerk:

Please prepare one record for the above entitled three cases, to include the following:

1. Amended Bill in Cause No. 555; 1a stipulation;
2. Answer to Amended Bill in Cause No. 555;
3. Amended Bill in Cause No. 556;
4. Answer to Amended Bill in Cause No. 556; excepting plat but with reference;
5. Amended Bill in Cause No. 557; 5a stipulation;
6. Answer to Amended Bill in Cause No. 557; excepting plat but with reference;

6a. Entry Nov. 26 '28 correcting amended bill in each case;

7. Narrative Statement of Evidence with all Exhibits as follows:

Plaintiff's Exhibits:
No. 1, City Appropriation plat;
No. 2, Lease, Reakirt to Friedlander;
Nos. 3, 4, 5, Stipulations as to evidence;

Praecipe for Record, etc.

Nos. 6 to 14 inclusive, Photographs showing north side of Fifth street.

Defendant's Exhibits:

No. A, Council Resolution of July 6, 1927;
No. B, Council Ordinance No. 155-1928;
Nos. C to O inclusive, Photographs showing south side of Fifth Street;
No. P, Plat of Planning Commission, March 5, 1925;
No. Q, Plat, Alternate Routes for Fifth Street Extension;
No. R, Plat, Third Street-Columbia Avenue-Torrence Road Boulevard;
No. S, Council Ordinance No. 318-1927;
No. T, Council Resolution of September 1, 1926;
No. T-1, Abstract of votes on Referendum.

8. Opinion of District Court Judge;
9. Judgment Entry in Cause No. 555;
10. Judgment Entry in Cause No. 556;
11. Judgment Entry in Cause No. 557;
12. Petition for Appeal in Cause No. 555;
13. Assignment of Errors in Cause No. 555;
14. Petition for Appeal in Cause No. 556;
15. Assignment of Errors in Cause No. 556;
16. Petition for Appeal in Cause No. 557;
17. Assignment of Errors in Cause No. 557;
18. Stipulation as to Record.
19. Citation in No. 555;
20. Citation in No. 556;
21. Citation in No. 557;
22. Bond in No. 555;
23. Bond in No. 556;
24. Bond in No. 557
25. Praecipe for record.

John D. Ellis,
City Solicitor.
Ed F. Alexander,
Assistant Solicitor,
Attorneys for Defendant.

PLAINTIFFS EXHIBIT No. 2.

THIS INDENTURE OF LEASE,

Made this 25th day of May, A. D. 1925, between LLEWELLYN B. REAKIRT, Lessor, and WALTER J. FRIEDLANDER, Lessee,

Witnesseth: That,

Said Lessor, for and in consideration of the rents herein reserved, and the covenants and agreements hereinafter contained, and by the said Lessee, his heirs, executors, administrators and assigns, to be paid and performed, does hereby Grant, Lease and Demise unto said Lessee, his heirs, executors, administrators and assigns, all the following described real estate in the City of Cincinnati, County of Hamilton and State of Ohio, to-wit:

Part of In-Lot Number Sixty-six (66) and Sixty-seven (67) on the original plan of the said City of Cincinnati, and more particularly described as follows:

Beginning at the Southwesterly corner of Fifth and Sycamore Streets as now existing, thence running Southwardly along the Westerly line of Sycamore Street one hundred and fifty (150) feet, more or less, to a point distant two hundred forty-nine and 45/100 (249.45) feet Northwardly of the Northerly line of Fourth Street as measured along said Westerly line of Sycamore Street; thence North 73° 37′ West, one hundred and thirty-eight (138) feet and eight (8) inches to the South-westerly corner of the property conveyed by Lillie Leonard, et al, to Lauretta B. Gibson by deed dated April 20, 1901, and recorded in Deed Book 857, Page 542, of the Records in the Office of the Recorder of Hamilton County, Ohio; thence running Northwardly along the Westerly line of said last mentioned premises one hundred and fifty (150) feet to the Southerly line of Fifth Street as now existing; thence running Eastwardly along the Southerly line of Fifth Street one hundred thirty-eight (138) feet and eight (8) inches to the Westerly line of Sycamore Street and the place of beginning.

The property hereinbefore described and hereby demised being the same premises conveyed to Lauretta B. Gibson by three deeds, as follows: by deed of Elizabeth McNicoll, widow, dated March 28, 1901, and recorded in Deed Book 856, Page 418; by deed of Edmund W. Kittredge, widower, dated February 17, 1906, and recorded in Deed Book 942, Page 442; and by deed of Lillie Leonard, et al, dated April 20, 1901, and recorded in Deed

Book 857, Page 542, in the Office of the Recorder of Hamilton County, Ohio; the said property hereinabove described and hereby demised having been inherited by said Llewellyn B. Reakirt, Lessor herein, from his mother, the said Lauretta B. Gibson, deceased.

The premises hereinabove described and hereby demised being so demised subject to the leases of The Standard Oil Company of Ohio and The Auto Park Company, and which leases are subject to termination upon sixty (60) days' notice in writing to the said Lesses.

TO HAVE AND TO HOLD the same together with the privileges and appurtenances thereunto appertaining and belonging, unto the said Lessee, his heirs, executors, administrators and assigns, for and during the full term of ninety-nine (99) years next ensuing from the first day of June, nineteen hundred and twenty-five (1925), fully to be completed and ended, and renewable forever.

The said Lessee, his heirs, executors, administrators and assigns, YIELDING AND PAYING therefor unto the said Lessor, his heirs and assigns Eighteen Thousand Dollars ($18,000.) for each and every year of and during the first ten (10) years of the term of this demise, and Twenty-four Thousand Dollars ($24,000.) for each and every year of and during the second ten (10) years of the term of this demise, and Thirty Thousand Dollars ($30,000.) for each and every year of and during the remainder of the term of this demise; each year's rent being payable in equal quarterly instalments on the last day of each quarter thereof, and the first such quarterly installment being payable on August 31, nineteen hundred and twenty-five (1925).

The said Lessee, for himself and for his heirs, executors administrators and assigns, does hereby Covenant and Agree to and with the said Lessor, his heirs and assigns, as follows, viz:

To pay the rent above reserved, as above specified; to pay all taxes, rates, charges and assessments of every kind that may at any time during this demise be levied, rated, charged or assessed on said premises, or any part thereof, for any purpose whatsoever, except the taxes ordinarily and usually due or payable in the month of June, nineteen hundred and twenty-five (1925), which said taxes the Lessor herein shall pay and discharge.

To keep the buildings hereafter erected on said land at all times insured against loss by fire in the sum of not less than eighty percentum (80%) of the insurable value of the said buildings above foundations, in companies

satisfactory to, and by policies approved by, and payable to the Lessor, his heirs or assigns, to whom they shall be delivered; and to pay the cost of all such insurance. If said buildings shall be damaged or destroyed by fire, the recovery thereon shall be applied to resorting the same; and should the amount realized on or from such insurance or under such insurance policies not be sufficient to defray the cost of restoring the said buildings damaged or destroyed by fire, then and in that event the balance of the cost required to restore the same shall be furnished and paid by the Lessee herein, his heirs or assigns; the insurance on said building to be written from time to time in a sufficient amount to cover the building risk as said building is constructed.

Not to commit or suffer any waste upon said premises; to peacably and quietly deliver up the same to the said Lessor, his heirs, assigns, at the expiration of said term, or sooner determination of this lease.

That the said Lessor, his heirs or assigns, shall have the first lien upon every right and interest of the Lessee and all claiming under said Lessee, to or in the said premises and the improvements thereon, to secure the payment of said rents and insurance premiums and the performance of the Lessee's covenants herein.

And the said Lessor, for himself and for his heirs, executors, administrators and assigns, covenants and agrees to and with the said Lessee, his heirs and assigns, that, paying the rents and performing the covenants aforesaid, they shall and may peaceably and quietly have and enjoy the aforesaid premises, with the appurtenances, for and during the term aforesaid, free from any let or hinderance by any person or persons whatsoever; and further, that (all rents, taxes and assessments being paid, and all covenants being performed by said Lessee, as herein stipulated) said Lessor, his heirs and assigns, will convey the said premises to the said Lessee, his heirs and assigns, by a good and sufficient deed of general warranty, with release of dower, upon the payment to him or them by said Lessee, his heirs or assigns, during the thirty-first year of the term of this demise, i. e., during the year beginning June 1, nineteen hundred and fifty-five (1955) and ending May 31, nineteen hundred and fifty-six (1956), of the sum of Six Hundred Thousand Dollars ($600,000.) in lawful money of the United States of America. If the Lessee, his heirs or assigns, shall exercise this option or privilege of purchase, then and in

that event the demised premises shall as hereinbefore provided for be conveyed by good and sufficient deed of general warranty with release of dower, the title to the said premises to be good and marketable, clear, free and unincumbered, save and except as to this lease, and save and except as to the taxes, rates, charges and assessments which under the terms and conditions of this lease are payable by the Lessee; also except as to any acts of commission and omission on the part of the Lessee.

It is hereby further stipulated and agreed by and between the parties hereto, that, within six (6) months from and after the date hereof, the Lessee shall commence the construction, shall thereafter construct and on or before May 31, nineteen hundred and twenty-six (1926) complete the construction, on the demised premises, of a commercial building to cost not less than Two Hundred and Fifty Thousand Dollars ($250,000.), and to be not less than three (3) stories in height, and which building, if not more than three (3) stories in height, shall be so constructed that two or more stories may be added to the same, and which building, if not more than four (4) stories in height, shall be so constructed that one or more stories may be added to the same. The plans and specifications for the said building shall first be submitted to the Lessor for his approval.

WHEREAS, however, the City of Cincinnati has planned and is contemplating adopting and is about to adopt or pass the necessary legislation to widen Fifth Street, by appropriating twenty-five (25) feet, more or less, off the Northerly side or part of the demised realty, i. e., along the entire front of said property on the Southerly side of Fifth Street, it is agreed, stipulated and provided that such building to be erected on the demised premises by the Lessee herein may be so erected with due regard to the planned and (or) contemplated use of the Northerly part thereof to the extent that twenty-five (25) feet, more or less, thereof, are likely to be or may be appropriated by the City of Cincinnati for the widening of said Fifth Street; and that, pending actual and final appropriation of any such part of the said demised premises by the said City of Cincinnati, and (or) in case no such appropriation ultimately be made, the Lessee herein, his heirs or assigns, may make any and all proper and suitable use of said part of said demised premises for and in connection with the remaining part of the demised premises and (or) with the building to be erected by the Lessee herein on the remaining part of the said de-

mised property, and (or) for constructing or erecting a proper and suitable addition or annex to the said building, or constructing or erecting a separate, proper and suitable building thereon.

In case such appropriation be made, then and in that event the entire sum of money or compensation which may be awarded for such appropriation of the said part of the demised realty with improvements, if any, and for damages to the residue thereof shall be paid unto the Lessee herein, his heirs or assigns, unless said appropriation and condemnation be made during the first year of this lease, and (or) before the building has been completed as herein provided, in which event the money so to be paid by the City of Cincinnati as compensation for the property taken to widen Fifth Street and (or) for damages to the residue thereof, shall be paid to the Lessor herein, his heirs or assigns, and held by him or them as security until the said building has been completed and all bills for material furnished and labor performed have been paid by said Lessee, his heirs or assigns, as well as all costs, expenses and attorneys' fees in the defense (to be conducted by the Lessee, his heirs or assigns) of the condemnation proceedings which are to be paid by the Lessee; and said Lessor, his heirs or assigns, shall pay said Lessee, his heirs or assigns, interest at the rate of four (4) per cent per annum during the time said money shall be held by said Lessor, his heirs or assigns, and until said building is completed and said payments are made, as above provided, at which time the said Lessor, his heirs or assigns, shall pay to the said Lessee, his heirs or assigns, said money received by said Lessor, his heirs or assigns, from said City of Cincinnati, with interest at four (4) per cent per annum.

It is further provided that the Lessee herein shall, simultaneously with the execution and delivery of this lease, pay unto the Lessor herein the sum of Eight Thousand Dollars ($8,000.), which, together with the Ten Thousand Dollars ($10,000.) heretofore paid by said Lessee to said Lessor at the time of the acceptance by said Lessor of a certain assignment to said Lessee of an option on the above described premises by The Burgess, Droege & Spilker Company, namely, on January 3, 1925, makes a sum of Eighteen Thousand Dollars ($18,000.) paid to said Lessor by said Lessee up to and including the date of the execution of this lease, which said sum of Eighteen Thousand Dollars ($18,000.) shall be held by said Lessor, his heirs and assigns, as security for the

faithful performance of all the covenants and agreements to be done and performed by said Lessee; and on the completion of said building and the payment of all bills by said Lessee, his heirs or assigns, for materials furnished and labor performed, the said sum of Eighteen Thousand Dollars ($18,000.) shall be applied by said Lessor, his heirs or assigns, to the payment of ground rents then due or taxes and insurance premiums that may be due and payable under the terms and provisions of this lease, and any balance remaining in the hands of said Lessor, his heirs or assigns, after said payments are made, shall at that time be returned to said Lessee, his heirs or assigns.

It is further provided and agreed that there shall be no rent paid on the said demised premises for a period of not longer than six (6) months from the commencement of the construction of said new building on said premises, which abatement of rents shall begin with the quarterly rent-day next succeeding the commencement of the construction of said new building, but said Lessee shall pay said quarterly rents as they become due and payable up to the time when said abatement begins, as above provided, and shall resume payments after the expiration of said six months abatement period.

PROVIDED, however, and these presents are upon these express conditions, that if, at any time, the rent aforesaid or any part thereof shall be in arrear, or unpaid, for the space of thirty (30) days after the same shall have become due and payable, and after demand of payment made personally or on said premises, which demand shall be equally good and effectual, whether made on the day of payment, or at any time afterward; or, if the said Lessee, his heirs, executors, administrators or assigns, shall fail to pay said taxes, rates, charges and assessments, or any part thereof, as the same become payable, or shall fail faithfully to keep and perform any other covenant or agreement herein contained, then, or in either such case, this lease (if the said Lessor, his heirs, executors, administrators or assigns so elect) shall cease, determine, and be void, and it shall be lawful for him or them to enter upon the said premises with the appurtenances, or any part thereof, in the name of the whole, and the same to occupy and repossess as though this demise had not been made.

IN WITNESS WHEREOF, the said Llewellyn B. Reakirt, Lessor herein, and the said Walter J. Friedlander, Lessee heirs, together with Grace C. Reakirt, the

wife of the said Llewellyn B. Reakirt, and who, the said wife, joins in the execution of this lease for the purpose of agreeing and consenting to the terms and conditions thereof in so far as she as such wife now has or may have any interest or rights, prospective or otherwise, in and to the demised premises, and (or) in as far as she may hereafter have any interest or rights in and to the demised premises as widow of the Lessor, should she survive her said husband, have set their hands hereunto and to a duplicate hereof, on the date first above written.

Signed and acknowledged
in presence of us:
Milton Sayler,
Oscar Stoehr,
as to Lessor and wife.
Milton Sayler,
Oscar Stoehr,
as to Lessee.

Llewellyn B. Reakirt,
Grace C. Reakirt,
Walter J. Friedlander.

The State of Ohio, }
County of Hamilton. } ss.

BE IT REMEMBERED, That on the 25th day of May, in the year of our Lord one thousand nine hundred and twenty-five (1925), before me, the subscriber, a Notary Public in and for said county, personally came LLEWELLYN B. REAKIRT, the Lessor named in the foregoing lease, and GRACE C. REAKIRT, his wife, and personally came WALTER J. FRIEDLANDER, the Lessee named in the foregoing lease, being all the parties to the said lease and acknowledged the signing thereof to be their voluntary act, for the uses and purposes therein contained.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name, and affixed my notarial seal, on the day and year last aforesaid.

John F. Monohan,
Notary Public, Hamilton County, Ohio.

PLAINTIFFS' EXHIBIT 3.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

James S. Richards, and Paschal L. Richards, Plaintiffs, vs. The City of Cincinnati, a municipal corporation under the laws of Ohio, Defendant.	No. 556 Eq.

STIPULATION AS TO EVIDENCE.

The following statements may be considered as true, if competent. Either side may object to the competency of any statements.

1. The amount of money at present available for the widening of Fifth street from Main street to Pike street is approximately $1,600,000.00.

2. The total expense of appropriating the 25 foot strip including the payment of damages to residue is estimated by the City on its appraisals at from $1,350,000.00 to $2,000,000.00. The property owners claims are considerably in excess of these amounts.

3. The expense of appropriating all the property including the 25 foot strip and the excess is estimated by the City on its appraisals at from $3,500,000.00 to $5,000,000.00. The property owners claims are considerably in excess of these amounts.

4. The two squares of Fifth Street next west of Main Street are in the heart of the city of Cincinnati and a large amount of traffic comes into them and proceeds eastwardly over Fifth street. The width of these two squares is 130 feet from property line to property line; the width of Fifth street from Main street to Pike street is 66 feet from property line to property line. It is proposed to widen this part to 91 feet by adding 25 feet on the south side.

5. Excepting the two squares of Fifth street referred to in 4), two squares of Eighth, known as Garfield Place, Broadway, south of Fourth street, Eggleston Avenue and Central Parkway, the width of streets in the downtown business district of Cincinnati is not in excess of 66 feet from property line to property line.

6. The buildings on the south side of Fifth street from

Plaintiff's Exhibit No. 3

Main to Pike street excepting the buildings on the square from Sycamore to Broadway and on the square from McAllister to Lawrence street are in the main old, and the frontages small in the individual cases.

7. The general average character of the buildings and lot frontages on the north side of Fifth street approximates that on the south side with the exceptions noted in 6.)

J. W. Peck,
Attorney for Plaintiff.
John D. Ellis,
City Solicitor.

PLAINTIFFS' EXHIBIT 4.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

Llewellyn B. Reakirt, Plaintiff, vs. The City of Cincinnati, a municipal corporation under the laws of Ohio, Defendant.	No. 557 Eq.

STIPULATION AS TO EVIDENCE.

The following statements may be considered as true, if competent. Either side may object to the competency of any statements.

1. The amount of money at present available for the widening of Fifth Street from Main Street to Pike Street is approximately $1,600,000.00.

2. The total expense of appropriating the 25 foot strip including the payment of damages to residue is estimated by the City on its appraisals at from $1,350,000.00 to $2,000,000.00. The property owners claims are considerably in excess of these amounts.

3. The expense of appropriating all the property including the 25 foot strip and the excess is estimated by the City on its appraisals at from $3,500,000.00 to $5,000,000.00. The property owners claims are considerably in excess of these amounts.

4. The two squares of Fifth Street next west of Main Street are in the heart of the city of Cincinnati and a

large amount of traffic comes into them and proceeds eastwardly over Fifth street. The width of these two squares is 130 feet from property line to property line; the width of Fifth street from Main street to Pike street is 66 feet from property line to property line. It is proposed to widen this part to 91 feet by adding 25 feet on the south side.

5. Excepting the two squares of Fifth street referred to in 4, two squares of Eighth, known as Garfield Place, Broadway, south of Fourth street, Eggleston Avenue and Central Parkway, the width of street in the downtown business district of Cincinnati is not in excess of 66 feet from property line to property line.

6. The buildings on the south side of Fifth street from Main to Pike street excepting the buildings on the square from Sycamore to Broadway and on the square from McAllister to Lawrence street are in the main old, and the frontages small in the individual cases.

7. The general average character of the buildings and lot frontages on the north side of Fifth street approximates that on the south side with the exceptions noted in 6).

Peck, Shaffer & Williams,
Attorneys for Plaintiff.
John D. Ellis,
City Solicitor.

PLAINTIFFS' EXHIBIT 5.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

Margaret W. Vester, Plaintiff, vs. The City of Cincinnati, a municipal corporation under the laws of Ohio, Defendant.	No. 555 Eq.

STIPULATION AS TO EVIDENCE.

The following statements may be considered as true, if competent. Either side may object to the competency of any statements.

1. The amount of money at present available for the

widening of Fifth Street from Main street to Pike street is approximately $1,600,000.00.

2. The total expense of appropriating the 25 foot strip including the payment of damages to residue is estimated by the City on its appraisals at from $1,350,000.00 to $2,000,000.00. The property owners' claims are considerably in excess of these amounts.

3. The expense of appropriating all the property including the 25 foot strip and the excess is estimated by the City on its appraisals at from $3,500,000.00 to $5,000,000.00. The property owners claims are considerably in excess of these amounts.

4. The two squares of Fifth street next west of Main Street are in the heart of the city of Cincinnati and a large amount of traffic comes into them and proceeds eastwardly over Fifth Street. The width of these two squares is 130 feet from property line to property line; the width of Fifth street from Main Street to Pike street is 66 feet from property line to property line. It is proposed to widen this part to 91 feet by adding 25 feet on the south side.

5. Excepting the two squares of Fifth street referred to in 4), two squares of Eight, known as Garfield Place, Broadway, south of Fourth street, Eggleston Avenue and Central Parkway, the width of streets in the downtown business district of Cincinnati is not in excess of 66 feet from property line to property line.

6. The buildings on the south side of Fifth street from Main to Pike street excepting the buildings on the square from Sycamore to Broadway and on the square from McAllister to Lawrence street are in the main old, and the frontages small in the individual cases.

7. The general average character of the buildings and lot frontages on the north side of Fifth street approximates that on the south side with the exceptions noted in 6).

Peck, Shaffer & Williams,
Attorneys for Plaintiff.
John D. Ellis,
City Solicitor.

DEFENDANT'S EXHIBIT A.

A RESOLUTION.

Declaring the intention to appropriate property for street widening purposes and in furtherance of said purpose to appropriate property in excess of that actually to be occupied by said improvement.

Be It Resolved by the Council of the City of Cincinnati, State of Ohio:

1. That Council hereby declares its intention to appropriate for the purpose of widening Fifth Street from the east side of Main Street to the west side of Pike Street the following described property, to-wit:

Tract No. 1—Beginning at the intersection of the south line of Fifth Street and the east line of Main Street; thence east along the south line of Fifth Street 157.42 feet to the west line of Lawson Alley; thence south along the west line of Lawson Alley twenty-five (25) feet; thence west, parallel to Fifth Street, 157.42 feet to the east line of Main Street; thence north along the east line of Main Street twenty-five (25) feet to the place of beginning.

Tract No. 2—Beginning at the intersection of the south line of Fifth Street and the east line of Lawson Alley; thence east along the south line of Fifth Street 239.51 feet to the west line of Sycamore Street; thence south along the west line of Sycamore Street twenty-five (25) feet; thence west, parallel to Fifth Street, 239.47 feet to the east line of Lawson Alley; thence north along the east line of Lawson Alley twenty-five (25) feet to the place of beginning.

Tract No. 3—Beginning at the intersection of the south line of Fifth Street and the east line of Sycamore Street; thence east along the south line of Fifth Street 414.55 feet to the west line of Broadway; thence south along the west line of Broadway twenty-five (25) feet; thence west, parallel to Fifth Street, 414.24 feet to the east line of Sycamore Street; thence north along the east line of Sycamore Street twenty-five (25) feet to the place of beginning.

Tract No. 4.—Beginning at the intersection of the south line of Fifth Street and the east line of Broadway; thence east along the south side of Fifth Street 170.46 feet to the west line of McAllister Street; thence south along the west line of McAllister Street 25 feet; thence west, parallel to the south line of Fifth Street, 170.46 feet

to the east line of Broadway; thence north along the east line of Broadway 25 feet to the place of beginning.

Tract No. 5.—Beginning at the intersection of the south line of Fifth Street and the east line of McAllister Street; thence east along the south line of Fifth Street 161.38 feet to the west line of Lawrence Street; thence south along the west line of Lawrence Street 25 feet; thence west, parallel to the south line of Fifth Street, 161.55 feet to the east line of McAllister Street; thence north along the east line of McAllister Street 25 feet to the place of beginning.

Tract No. 6.—Beginning at the intersection of the south line of Fifth Street and the east line of Lawrence Street thence east along the south line of Fifth Street 281.80 feet to the west line of Pike Street; thence south along the west line of Pike Street 28.23 feet; thence west, parallel to the south line of Fifth Street, 294.91 feet to the east line of Lawrence Street; thence north along the east line of Lawrence Street 25 feet to the place of beginning.

II. That Council hereby declares its intention to appropriate, in excess of the above described property, necessary for said street widening, the following described property, to-wit:

Tract E.—1. Beginning at a point in the east line of Main Street 25 feet south of the south line of Fifth Street; thence east, parallel to the south line of Fifth Street, 157.42 feet to the west line of Lawson Alley; thence south along the west line of Lawson Alley 75.40 feet to the south line of the property belonging to J. S. G. Porter and leased to Theodore A. Kirk et al. by a lease as per Lease Book 159, page 60; thence west along said Porter's south line 157.42 feet to the east line of Main Street; thence north along the east line of Main Street 75.94 feet to the place of beginning.

Tract E.—2. Beginning at a point in the east line of Lawson Alley 25 feet south of the south line of Fifth Street; thence east, parallel to the south line of Fifth Street, 239.47 feet to the west line of Sycamore Street; thence south along the west line of Sycamore Street 124.67 feet to the south line of the property conveyed to Llewellyn B. Reakirt by deed recorded in Deed Book 1315, page 358; thence west along the south line of said Reakirt's property and also the south line of the property conveyed to William E. and Ray S. Fox by affidavit recorded in Deed Book 1234, page 239 and also the south line of the property conveyed to William F. Fox et al.

by deed recorded in Deed Book 185, page 13, 239.20 feet to the east line of Lawson Alley; thence north along the east line of Lawson Alley 124.64 feet to the place of beginning.

Tract E.—3. Beginning at a point in the east line of Broadway 25 feet south of the south line of Fifth Street; thence east, parallel to the south line of Fifth Street, 170.46 feet to the west line of McAllister Street; thence south along the west line of McAllister Street 75.15 feet to the south line of the property conveyed to Arnold Tietig, Jr., et al. by affidavit recorded in Deed Book 1219, page 225; thence west along the south line of the said Tietig property and the property conveyed by the Western and Southern Life Insurance Company by deeds recorded in Deed Book 1345, page 43, and Deed Book 1344, page 63, 80 feet; thence north along the west line of said the Western and Southern Life Insurance Company property two feet to the south line of the property conveyed to Richard Miller by deed recorded in Deed Book 593, page 80; thence west along said Miller's south line 90.27 feet to the east line of Broadway; thence north along the east line of Broadway 73.15 feet to the place of beginning.

Tract E.—4. Beginning at a point in the east line of Lawrence Street 25 feet south of the south line of Fifth Street; thence east, parallel to the south line of Fifth Street, 294.91 feet to the west line of Pike Street; thence south along the west line of Pike Street 84.68 feet to the north line of Buchanan Street; thence west along the north line of Buchanan Street 334.26 feet to the east line of Lawrence Street; thence north along the east line of Lawrence Street 75 feet to the place of beginning.

III. That Council hereby declares that the appropriation of said excess property described in Section 2 hereof is in furtherance of the said widening of Fifth Street as described in Section 1 hereof, and is necessary for the complete enjoyment and preservation of said public use.

(The above property is indicated on plan Accession No. 15676 on file in the Department of Highways.)

Passed July 6, A. D. 1927.

Attest: L. B. Blakemore, Clerk.

Murray Seasongood, Mayor.

Defendant's Exhibit A

COUNCIL OF THE CITY OF CINCINNATI

State of Ohio

Clerk's Office }
City of Cincinnati. }

I Hereby Certify, That the foregoing Transcript is correctly copied from the books, papers and journals of Defendant's Exhibit A
the City of Cincinnati, kept under authority and by direction of the Council thereof.

In Testimony Whereof, I have hereunto set my name and affixed the seal of the Clerk's office this 22nd Day of November in the year nineteen hundred and twenty eight. (Seal)

L. B. Blakemore,
Clerk of Council.
By Robert Franken,
Record and Certification Clerk.

DEFENDANT'S EXHIBIT B.

AN ORDINANCE NO. 155-1928.

To appropriate property for the purpose of widening Fifth street, from the east side of Main street to the west side of Pike street, and in furtherance of said purpose to appropriate property in excess of that actually to be occupied by said improvement.

Be It Ordained, by the Council of the City of Cincinnati, State of Ohio, two thirds of all the members elected thereto concurring:

Section 1. That the following described property be, and the same hereby is, appropriated to public use for street purposes for the widening of Fifth street, from the east side of Main street to the west side of Pike street, to-wit:

Tract No. 1. Beginning at the intersection of the south line of Fifth street and the east line of Main street; thence east along the south line of Fifth street 157.42 feet to the west line of Lawson alley; thence south along the west line of Lawson alley twenty-five (25) feet; thence west, parallel to Fifth street, 157.42 feet to the east line of Main street; thence north along the east line of Main street twenty-five (25) feet to the place of beginning.

Defendant's Exhibit B

Tract No. 2. Beginning at the intersection of the south line of Fifth street and the east line of Lawson alley; thence east along the south line of Fifth street 239.51 feet to the west line of Sycamore street; thence south along the west line of Sycamore street twenty-five (25) feet; thence west, parallel to Fifth street, 239.47 feet to the east line of Lawson alley; thence north along the east line of Lawson alley twenty-five (25) feet to the place of beginning.

Tract No. 3. Beginning at the intersection of the south line of Fifth street and the east line of Sycamore street; thence east along the south line of Fifth street 414.55 feet to the west line of Broadway; thence south along the west line of Broadway twenty-five (25) feet; thence west, parallel to Fifth street, 414.24 feet to the east line of Sycamore street; thence north along the east line of Sycamore street twenty-five (25) feet to the place of beginning.

Tract No. 4. Beginning at the intersection of the south line of Fifth street and the east line of Broadway; thence east along the south side of Fifth street 170.46 feet to the west line of McAllister street; thence south along the west line of McAllister street 25 feet; thence west, parallel to the south line of Fifth street, 170.46 feet to the east line of Broadway; thence north along the east line of Broadway 25 feet to the place of beginning.

Tract No. 5. Beginning at the intersection of the south line of Fifth street and the east line of McAllister street; thence east along the south line of Fifth street 161.38 feet to the west line of Lawrence street; thence south along the west line of Lawrence street 25 feet; thence west, parallel to the south line of Fifth street 161.55 feet to the east line of McAllister street; thence north along the east line of McAllister street 25 feet to the place of beginning.

Tract No. 6. Beginning at the intersection of the south line of Fifth street and the east line of Lawrence street; thence east along the south line of Fifth street 281.80 feet to the west line of Pike street; thence south along the west line of Pike street 28.23 feet; thence west, parallel to the south line of Fifth street 294.91 feet to the east line of Lawrence street; thence north along the east line of Lawrence street 25 feet to the place of beginning.

Section 2. That, in furtherance of the public use set forth in Section 1 hereof, and for the more complete enjoyment and preservation of the benefits to accrue from

said public use, the following described property be, and the same hereby is, appropriated in excess of the property described in Section 1 hereof:

Tract E—1. Beginning at a point in the east line of Main street 25 feet south of the south line of Fifth street; thence east, parallel to the south line of Fifth street, 157.42 feet to the west line of Lawson alley; thence south along the west line of Lawson alley 75.40 feet to the south line of the property belonging to J. S. G. Porter and leased to Theodore A. Kirk et al. by a lease as per Lease Book 159, page 60; thence west along said Porter's south line 157.42 feet to the east line of Main street; thence north along the east line of Main street 74.94 feet to the place of beginning.

Tract E—2. Beginning at a point in the east line of Lawson alley 25 feet south of the south line of Fifth street; thence east, parallel to the south line of Fifth street, 239.47 feet to the west line of Sycamore street; thence south along the west line of Sycamore street 124.67 feet to the south line of the property conveyed to Llewellyn B. Reakirt by deed recorded in Deed Book 1315, page 358; thence west along the south line of said Reakirt's property and also the south line of the property conveyed to William E. and Ray S. Fox by affidavit recorded in Deed Book 1,234, page 239, and also the south line of the property conveyed to William F. Fox et al. by deed recorded in Deed Book 185, page 13, 239.20 feet to the east line of Lawson alley; thence north along the east line of Lawson alley 124.64 feet to the place of beginning.

Tract E—3. Beginning at a point in the east line of Broadway 25 feet south of the south line of Fifth street; thence east parallel to the south line of Fifth street, 170.46 feet to the west line of McAllister street; thence south along the west line of McAllister street 75.15 feet to the south line of the property conveyed to Arnold Tietig, Jr., et al. by affidavit recorded in Deed Book 1,219, page 225; thence west along the south line of the said Tietig property and the property conveyed to the Western and Southern Life Insurance Company by deeds recorded in Deed Book 1,345 page 43, and Deed Book 1,344, page 63, 80 feet; thence north along the west line of said the Western and Southern Life Insurance Company property two feet to the south line of the property conveyed to Richard Miller by deed recorded in Deed Book 593, page 80; thence west along said Miller's south line 90.27 feet to the east line of Broadway; thence north along the east line of Broadway 73.15 feet to the place of beginning.

Defendant's Exhibit B

Tract E—4. Beginning at a point in the east line of Lawrence street 25 feet south of the south line of Fifth street; thence east, parallel to the south line of Fifth street, 294.91 feet to the west line of Pike street; thence south along the west line of Pike street 84.68 feet to the north line of Buchanan street; thence west along the north line of Buchanan street 334.26 feet to the east line of Lawrence street; thence north along the east line of Lawrence street 75 feet to the place of beginning.

Section 3. That the City Solicitor be, and he hereby is, authorized and directed to apply to a court of competent jurisdiction to have a jury impaneled to make inquiry into and assess the compensation to be paid for the several parcels of real estate constituting said tracts, such compensation in the case of parcels taken partly for public use and partly by way of excess condemnation to be apportioned between the parts.

Section. 4. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed March 21, A. D. 1928.

M. Seasongood, Mayor.

Attest: L. B. Blakemore, Clerk.

DEFENDANTS' EXHIBIT B.

COUNCIL OF THE CITY OF CINCINNATI

State of Ohio

Clerk's Office }
City of Cincinnati. }

I Hereby Certify, That the foregoing Transcript is correctly copied from the books, papers and journals of the City of Cincinnati, kept under authority and by direction of the Council thereof.

In Testimony Whereof, I have hereunto set my name and affixed the seal of the Clerk's office this 22nd Day of November in the year nineteen hundred and twenty eight. (Seal)

L. B. Blakemore,
Clerk of Council.
By Robert Franken,
Record and Certification Clerk.

DEFENDANT'S EXHIBIT S.

AN ORDINANCE No. 318-1927

Providing for the issue of bonds by the City of Cincinnati for the purpose of paying said City's part of the cost and expense of improving sundry existing streets by widening and extending such streets, and by purchasing or condemning any land necessary for widening and extending such streets, including the construction of viaducts and retaining walls, as follows: Columbia Avenue, from Torrence road to Pike street, via Kemper lane; Gladstone avenue and East Third street and Martin street, from East Third street to Eden Park drive, in the sum of one hundred and twenty thousand dollars ($120,000.00) (in connection with an issue of bonds heretofore authorized by a favorable vote on the subject of issuing bonds in the sum of $1,000,000.00 for the purposes aforesaid), and also for the purpose of providing funds to pay the interest accruing on said bonds previous to the receipt of taxes from which such interest is to be ultimately paid.

Whereas, At an election held in the City of Cincinnati, Hamilton County, Ohio, on November 2d, 1926, on the question of issuing bonds for five purposes and on increasing the tax levy for the City of Cincinnati, Hamilton County, Ohio, one of which purposes provides for an issue of bonds of the City of Cincinnati for the purpose of paying said City's part of the cost and expenses of improving sundry existing streets by widening and extending such streets, and by purchasing or condemning any land necessary for widening and extending such streets, including the construction of viaducts and retaining walls, as follows: Columbia avenue, from Torrence road to Pike street, via Kemper lane; Gladstone avenue and East Third street and Martin street, from East Third street to Eden Park drive, in the sum of one million dollars ($1,000,000.00) and the levy of taxes outside of the existing limitations estimated by the County Auditor to average .071 mill for a maximum period of twenty-five (25) years, and to pay the principal and interest on such bonds; and,

Whereas, More than fifty-five (55) per cent of the voters voting at said election on the question of an issue of bonds by the City of Cincinnati, as above set forth, voted in favor thereof; and,

Whereby, It is hereby determined by this Council that it is necessary at this time to provide a fund of $120,000.00, representing three (3) annual maturities in the

sum of forty thousand dollars ($40,000.00) each being for the years 1928, 1929 and 1930 of said original amount authorized at the election as aforesaid, in accordance with the provisions of this ordinance, for the purpose of proceeding with a portion of the improvements for which authority was given by said vote for the issuing of bonds in the sum of one million dollars ($1,000,000.00); now, therefore,

Be It Ordained by the Council of the City of Cincinnati, State of Ohio:

Section 1. That it is deemed necessary by the Council of the City of Cincinnati, State of Ohio, to issue and sell bonds of said City in the sum of one hundred and twenty thousand dollars ($120,000.00) for the purpose of paying said City's part of the cost and expense of improving sundry existing streets by widening and extending such streets, and by purchasing or condemning any land necessary for widening and extending such streets, including the construction of viaducts and retaining walls, as follows: Columbia avenue, from Torrence road to Pike street, via Kemper lane; Gladstone avenue and East Third street, and Martin street, from East Third street to Eden Park drive (in connection with an issue of bonds heretofore authorized by a favorable vote on the subject of issuing bonds in the sum of $1,000,000.00 for the purposes as aforesaid), and also for the purpose of providing a fund to pay the interest accruing on said bonds previous to the receipt of taxes from which such interest is to be ultimately paid.

Section 2. That bonds of said City shall be issued in the sum of one hundred and twenty thousand dollars ($120,000.00), (of which amount the sum of $1,275.00 is the amount included for interest maturing on said bonds previous to the receipt of taxes from which such interest is to be ultimately paid), for the purposes aforesaid. Each of said bonds shall be in such denomination as has been determined by the City Auditor and set forth in this ordinance. Said bonds shall be dated June 1, 1927, and shall be payable in three (3) equal annual installments, with interest thereon at the rate of four and one-quarter per cent (4¼%) per annum, payable semi-annually.

Said bonds shall be in the amounts and dates of maturity as follows:

Amount of Bond	Date of Maturity
$40,000.00	September 1, 1928
$40,000.00	September 1, 1929
$40,000.00	September 1, 1930

and represents the first three annual maturities of a series of twenty-five (25) bonds of like date and tenor, except as to the maturities thereof, aggregating the sum of one million dollars ($1,000,000.00), and all of which maturities are hereby determined to be in substantially equal annual installments.

Said bonds shall be issued, executed and disposed of in accordance with law and the ordinance of this Council to regulate the issue and sale of bonds of the City of Cincinnati, State of Ohio, passed February 27, 1912.

Section 2. The proceeds from the sale of said bonds, except the sum included in the amount of the issues to the extent necessary to provide a fund for the payment of interest maturing on said bonds previous to the receipt of taxes from which said interest is to be ultimately paid, and the premium and accrued interest thereon, shall be credited to a fund for the purpose of paying the City's portion of the cost and expenses of the improvements as set forth in Section 1 of this ordinance, and shall be paid out upon the order of the City Manager, and shall be expended by said City Manager for the purposes specified herein.

Section 4. For the purpose of providing the necessary funds to pay the interest on the foregoing issue of bonds promptly when and as the same falls due, and also to provide a fund sufficient to discharge the said serial bonds at maturity, there shall be and is hereby levied on all the taxable property in the City of Cincinnati, in addition to all other taxes, outside of the limitations of Section 5649-5b of the General Code, and all other limitations upon tax rates provided by law, a direct tax annually during the period of time said bonds are to run in an amount sufficient to provide funds to pay interest upon said bonds as and when the same falls due, and also provide a fund for the discharge of the principal of said serial bonds at maturity, which taxes shall not be less than the interest and sinking fund tax required by Section II, Article XII, of the Constitution.

Said tax shall be and is hereby ordered computed, certified, levied and extended upon the tax duplicate and collected by the same officials in the same manner and at the same time that taxes for general purposes for each of said years are certified, extended and collected. Said tax shall be placed before and in preference to all items and for the full amount thereof. The funds derived from said tax levies hereby required shall be placed in a separate and distinct fund, which, together with the interest

collected on the same, shall be irrevocably pledged for the payment of principal and interest on said bonds when and as the same fall due.

Section 5. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed June 1, A. D. 1927.

Murray Seasongood, Mayor.

Attest: L. B. Blakemore, Clerk.

A copy of this ordinance is on file in the office of the Clerk of Council for public inspection.

COUNCIL OF THE CITY OF CINCINNATI

State of Ohio

Clerk's Office }
City of Cincinnati }

I Hereby Certify, That the foregoing Transcript is correctly copied from the books, papers and journals of the City of Cincinnati, kept under authority and by direction of the Council thereof.

In Testimony Whereof, I have hereunto set my name and affixed the seal of the Clerk's office this 26th day of November in the year nineteen hundred and twenty-eight. (Seal)

L. B. Blakemore,
Clerk of Council,
By Robert Franken,
Record and Certification Clerk.

DEFENDANT'S EXHIBIT T.

LEGAL NOTICE.

Referendum Bonds (Street Widening, Etc.).

Notice is hereby given that on the 1st day of September, 1926, Council of the City of Cincinnati, State of Ohio, passed the following:

A RESOLUTION.

Electing to submit to a vote of the people a $1,000,000.00 City of Cincinnati, Ohio, General Street Improvement Bond Issue for the purpose of paying the city's part of the cost and expense of improving sundry

Defendant's Exhibit T

existing streets by widening and extending such streets, and by purchasing and condemning any land necessary for widening and extending such streets, and including the construction of viaducts and retaining walls as follows: Columbia avenue, from Torrence road to Pike street, via Kemper lane; Gladstone avenue and East Third street to Eden Park drive.

Be it resolved by the Council of the City of Cincinnati, State of Ohio:

Section 1. That the necessity of a bond issue in the sum of one million dollars ($1,000,000.00) for the purpose of paying said city's part of the cost and expense of improving sundry existing streets by widening and extending such streets, and by purchasing and condemning any land necessary for widening and extending such streets and including the construction of viaducts and retaining walls as follows: Columbia avenue, from Torrence road to Pike street, via Kemper lane; Gladstone avenue and East Third street; Martin street, from East Third street to Eden Park drive, maturing in equal or substantially equal annual installments for approximately twenty-five (25) years and of the levy of a tax outside of the limitations of Section 5649-5b, General Code, and all other limitations upon tax rates prescribed by law, to pay the interest on and to retire said bonds, is hereby set forth.

Said bonds shall be dated approximately July 1, 1927, and shall mature in equal or substantially equal annual installments for twenty-five (25) years, and shall bear interest not to exceed six per cent (6%) per annum, payable semi-annually.

Section 2. This resolution shall be certified to the County Auditor on or before September 2, 1926. Thereupon and prior to September 11, 1926, the County Auditor shall calculate the average annual levy throughout the life of the bonds which will be required to pay the interest on and retire such bonds, assuming that the amount of the tax list of the subdivision of the City of Cincinnati remains the same throughout the life of said bonds as the amount of the list for the current year, and if this is not determined the estimated amount submitted by the County Auditor to the County Budget Commission.

The County Auditor shall, prior to September 11, 1926, certify the amount of such average to this Council.

Defendant's Exhibit T

Thereupon this Council, if it desires to proceed with the issue of said bonds, shall, prior to September 21, 1926, certify this resolution, together with the amount of the average tax levy estimated by the County Auditor and the maximum number of years required to retire the bonds to the Deputy State Supervisors of Elections of the county, and they shall prepare the ballots and make other necessary arrangements for the submission of the question to the voters at the ensuing November election.

The election on said question shall be held at the regular places of holding elections in the City of Cincinnati at the November, 1926, election, and shall be conducted, canvassed and certified in the same manner as regular elections in the taxing district of the City of Cincinnati for the election of officers thereof. Notice of the election shall be published in one or more newspapers printed and of general circulation in the City of Cincinnati once a week for four (4) consecutive weeks prior thereto, stating the amount of the proposed bond issue, the purpose for which it is to be issued, and the maximum number of years during which such bonds shall run, and the estimated average additional rate outside of the limitations of Section 5649-5b, as certified by the County Auditor.

Section 3. The form of the ballots cast at such election shall be as follows:

"For an issue of bonds by the City of Cincinnati for the purpose of paying said city's part of the cost and expenses of improving sundry existing streets by widening and extending such streets, and by purchasing or condemning any land necessary for widening and extending such streets, including the construction of viaducts and retaining walls, as follows: Columbia avenue, from Torrence road to Pike street, via Kemper lane; Gladstone avenue and East Third street, and Martin street, from East Third street to Eden Park drive, in the sum of one million dollars ($1,000,000.00) and the levy of taxes outside of the existing limitations estimates by the County Auditor to average ——— mills for a maximum period of twenty-five (25) years, and to pay the principal and interest on such bonds, Yes."

"For an issue of bonds by the City of Cincinnati for the purpose of paying said city's part of the cost and expense of improving sundry existing streets by widening and extending such streets, and by purchasing or condemning any land necessary for widening and extending such streets, including the construction of viaducts and retaining walls, as follows: Columbia avenue, from Torrence road to Pike street, via Kemper lane; Gladstone

avenue and East Third street, and Martin street, from East Third street to Eden Park drive, in the sum of one million dollars ($1,000,000.00), and the levy of taxes outside of the existing limitations estimated by the County Auditor to average ——— mills for a maximum period of twenty-five (25) years and to pay the principal and interest on such bonds, No."

Passed September 1, A. D., 1926.

Murray Seasongood, Mayor.

Attest: L. B. Blakemore, Clerk.

A copy of this resolution is on file in the office of the Clerk of Council for public inspection.

COUNCIL OF THE CITY OF CINCINNATI

State of Ohio

Clerk's Office, }
City of Cincinnati, }

I Hereby Certify that the foregoing Transcript is correctly copied from the books, papers and journals of the City of Cincinnati, kept under authority and by direction of the Council thereof.

In Testimony Whereof, I have hereunto set my name and affixed the seal of the Clerk's office this 27th Day of November, in the year nineteen hundred and twenty-eight.

L. B. Blakemore,
Clerk of Council,

By .....
Record and Certification Clerk.

(Seal)

DEFENDANT'S EXHIBIT T-1.

(Seal) Cincinnati, November 22, 1926.

Hon. L. B. Blakemore, Clerk,
Council of the City of
Cincinnati, Ohio.

Dear Sir:—

I, Anna Marcus, duly appointed and qualified Clerk of the Board of Deputy State Supervisors and Inspectors of Elections of Hamilton County, Ohio, hereby certify the following to be a true and correct abstract of the vote

cast at the election held in the City of Cincinnati on November 2nd, 1926 on the following propositions:

$1,000,000.00		
Streets Improvement	Yes received	64196
Auburn Ave. et al.	No	27305
$1,000,000.00		
Street Widening	Yes	57282
Columbia Ave. et al.	No	32580
$1,250,000.00		
Parks, Boulevards &	Yes	51808
Playgrounds	No	36713
$985,000.00		
University of	Yes	47647
Cincinnati	No	40769
$1,000,000.00		
Grade Crossing	Yes	66909
Eliminations	No	23814
Total Vote Cast		114660

Respectfully submitted,
(Signed) Anna Marcus,
Clerk.

COUNCIL OF THE CITY OF CINCINNATI

State of Ohio

Clerk's Office, }
City of Cincinnati, }

I Hereby Certify, That the foregoing Transcript is correctly copied from the books, papers and journals of the City of Cincinnati, kept under authority and by direction of the Council thereof, and that the foregoing was ordered filed by the Council of the City of Cincinnati, Ohio, on November 24th, 1926.

In Testimony Whereof, I have hereunto set my name and affixed the seal of the Clerk's office this 27th Day of November, in the year nineteen hundred and twenty-eight.

L. B. Blakemore,
Clerk of Council,
By Robert Franken,
Record and Certification Clerk.

(Seal)

CLERK'S CERTIFICATE.

I, Harry F. Rabe, Clerk of the District Court of the United States for the Southern District of Ohio, Western Division, do hereby certify that the foregoing pages contain a true and correct copy of those portions of the record and proceedings indicated in the Praecipe found on page 72 hereof, as the same appear of record and on file in the office of the clerk of said court in the following cases:

Margaret W. Vester,
v. No. 555
The City of Cincinnati.

James S. Richards and
Paschal S. Richards,
v. No. 556
The City of Cincinnati.

Llewellyn B. Reakirt,
v. No. 557
The City of Cincinnati.

In Witness Whereof, I have hereunto subscribed my name and affirmed the seal of said court, at the City of Cincinnati, this ——— day of ————————, 1929.

———————————————

(Seal) Clerk.

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

CAUSES ARGUED AND SUBMITTED

(March 13, 1929—Before: DENISON, MOORMAN and HICKS, JJ.)

These causes are argued together by Mr. John D. Ellis, City Solicitor, and Mr. Ed. F. Alexander, Assistant City Solicitor, for the Appellant, and by Mr. John Weld Peck for the Appellees and are submitted to the Court.

DECREE

No. 5343

(Filed June 6, 1929)

Appeal from the District Court of the United States for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be and the same is hereby affirmed.

DECREE

No. 5344

(Filed June 6, 1929)

Appeal from the District Court of the United States for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

On Consideration Whereof, it is now here ordered adjudged and decreed by this Court that the decree of the said District Court in this cause be and the same is hereby affirmed.

DECREE

No. 5345

(Filed June 6, 1929)

Appeal from the District Court of the United States for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be and the same is hereby affirmed.

OPINION

Nos. 5343-5344-5345

(Filed June 6, 1929)

Before DENISON, MOORMAN and HICKS, Circuit Judges.

MOORMAN, Circuit Judge: In March, 1928, the appellant, City of Cincinnati, by its council, passed an ordinance to appropriate a strip of land 25 feet in width adjacent to the South line of Fifth Street for the purpose of widening the street. By the same ordinance the city undertook to condemn additional areas adjacent to this strip, on the South side thereof, between Main and Pike Streets, the intersecting streets being Lawson Alley, Sycamore, Broadway, McAllister and Lawrence. The appellees brought separate suits in the district court to enjoin the city from condemning their property lying within this additional area. The cases presented similar questions and were tried together in the court below, in which orders of injunction were issued from which these appeals are prosecuted. They were argued together in this court and will be disposed of in one opinion.

The sole question for decision is whether the property is to be devoted to a public or a private use. A brief description of it is necessary. The Vester lot fronts on Broadway, 44 feet South of Fifth Street, and is therefore 19 feet South of the 25 foot strip which is to be taken for street purposes. Upon this lot there is a brick house of three stories, the lower floor of which is occupied by Mrs. Vester's son, a physician in the active practice of medicine. The Reakirt lot is located at the corner of Fifth and Sycamore Streets, fronting 138.8 feet on Fifth and approximately 150 feet on Sycamore. There is at present a temporary oil-filling station on this lot near the corner, and the remainder of it is used as a parking lot. The 25 foot strip actually to be used for a street is about one-sixth of the lot, but the city proposes to take the entire lot. The Richards lot has a frontage of 23 feet on the South side of Fifth Street and extends

South therefrom to Buchanan Street a distance of 100 feet. The city proposes to take not only the 25 feet on Fifth Street, but the entire lot back to Buchanan. This lot differs from the other two in that in appropriating the 25 feet next to Fifth Street it would be necessary to cut through a building that is now on the lot. The value of this building, however, is not sufficient to differentiate the case in principle from the others.

We note, also, as bearing upon the purpose of the city, that fronting on the South side of Fifth Street, as it is now constructed, betwen Main and Pike Streets, there is a tract owned by the Masonic Temple Company, upon part of which there is a Masonic Building, which is set back 25 feet from the street line. The other part is occupied by a vacant building that is not used in connection with the Masonic Building, the north 25 feet of which is to be taken in the regular condemnation. Another tract on the South side of Fifth between Main and Pike Streets, with like frontage, is owned and occupied by the congregation of the Sisters of St. Joseph. The building on this tract has been set back 25 feet from the present South line of Fifth Street. No part of either of these tracts has been subjected to excess condemnation. It is to be said, however, that the buildings that have been constructed upon them are substantial and attractive.

Fifth Street from Main Street to Pike Street is now 66 feet in width. To its further widening the appellees make no objection, but object to the taking of the excess area. It was stated in the ordinance authorizing the condemnation that this additional area was not to be occupied by the improvement, but was taken "for the more complete enjoyment and preservation of the benefits to accrue from the taking of the 25 foot strip." The answers alleged that the purpose of the taking was to further the appropriate development of the South side of Fifth Street "by using or disposing of its excess in tracts of such size and with such restrictions as will inure to the public advantage."

The suits are based upon rights claimed under the Fourteenth Amendment. Under the laws of Ohio the only way in which these questions could be raised was by

injunction proceedings. *Railroad* v. *Greenwell,* 69 O. S. 487; *Sargent* v. *Cincinnati,* 110 O. S. 444. It is not, therefore, contended that these proceedings violate Section 265 of the Judicial Code, or that the court is without jurisdiction to restrain the proposed action if it violates constitutional rights.

The appropriating ordinance was enacted pursuant to Article 18 of Section 10 of the Constitution of Ohio.[1] That provision authorizes what is known as "excess condemnation," which, as broadly defined, is the taking by eminent domain of more property than is necessary for the creation of a public improvement, and of subsequently selling or leasing the surplus. The right is claimed in these cases upon three grounds. The first, called the "remnant" theory, is that by taking only such parts of the land as are needed for street purposes, fragments of lots would remain of such size and shape as to render them separately valueless, with the result that the city would be required to pay for the whole, although it only took a part, and with the further result that because of the lack of such value the city would thereafter be deprived of collecting taxes on this property. The second or "protective" theory is that if the city owned the adjacent land, it could sell it under restrictions that would preserve the beauty of the street, and thus permit or facilitate the normal increase in the values of the surrounding property. The third or "recoupment" theory is that the city would be able to dispose of the parts of the property not needed for the street at prices that would enable it to recoup much of the cost of the proposed construction.

The remnants theory, as technically considered, is not applicable to the property here involved. No part of the Vester property is included in the 25 foot strip. Only

[1] "Appropriation in excess of public use. A Municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement, and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made. Bonds may be issued to supply the funds in whole or in part to pay for the excess property so appropriated or otherwise acquired, but said bonds shall be a lien only against the property so acquired for the improvement and excess, and they shall not be a liability of the municipality nor be included in any limitation of the bonded indebtedness of such municipality prescribed by law."

one-sixth of the Reakirt property is included therein, and the remaining five-sixths is sufficiently large for appropriate building sites for that section of the city. Similarly, what is left of the Richards property, three-fourths, would be valuable and utilizable for purposes suitable to the location of the property. Thus in one case no part of the property is to be occupied by the street, and in each of the others there will be enough left to meet the needs of suitable buildings for that vicinity. Consequently, in none of them can it be said that in assessing damages to the owner the jury would be justified in taking as its criterion the value of the entire tract. It ought not to be held, we think, that, because there would be unusable portions of other adjacent lots, the city should have the right to take property that is usuable merely to join it with those unusuable remnants in order to sell them advantageously.

The protection theory has no practical aspects and may be entirely disregarded. The proofs do not show that the city has any present plan for beautifying or establishing building restrictions on the South side of Fifth Street. Nor does it appear that the ownership of this property any more than that of the adjoining property is essential to the development or the carrying out as a whole of any plans of that character that the city may hereafter devise. There remains only the recoupment theory. The court below rightly found that it was upon that theory alone that the city was proceeding. It is sought to be justified upon the ground of a public benefit amounting to a public use.

It is to be admitted that under our present methods of living public necessity requires that the citizen be deprived of much of the freedom of use of his property that formerly seemed to inhere in its ownership. There has been, nevertheless, no departure from established principles, but only an application of them to new conditions; and it is the law now, as it always has been, that the due process clause of the constitution applies to the state and all of its agencies. *Railroad Co.* v. *Chicago*, 166 U. S. 226; *Railway* v. *Railroad Co.*, 166 U. S. 557. It is equally well settled that condemnation for a non-

public use is a denial of due process of law (*Irrigation District* v. *Bradley*, 164 U. S. 112; *Traction Company* v. *Mining Co.*, 186 U. S. 239); and that whether the use is public or private is a judicial question. *Hairston* v. *Railway Co.*, 208 U. S. 598. This latter question is sometimes difficult of solution. Public benefit has been spoken of by some of the courts as a public use, but properly so only with respect to the case at hand, and where the public interest is so paramount as to require the subject matter for a public use. None of the cases relied upon by the city, some of which are cited in the margin,[2] by analogy or otherwise, holds that such a use as the city proposes to make of these properties is a public use. In none of them has the use been found to be of a public character because of financial benefits to the condemnor or taker, as such, but it uniformly has been made to depend upon a use so dominantly and directly related to the public as to be indispensable to its welfare. That cannot be said in these cases.

We do not say that the city of Cincinnati might not in a proper case take land adjacent to one of its public streets for a lateral support or to preserve the street as such. Neither do we decide that there may not be cases where the remnant would be so small as compared to what was actually needed and taken, that what was needed might not be regarded, in view of what was left, as the equivalent of the entire tract, and thus the entire tract be taken. We consider only these cases before us; and what we decide is that the proposed use is not a public use within the meaning of that term as it heretofore has been held to justify the taking of private property. The provision of the constitution is that the municipality in acquiring property for public use "may, in furtherance of such public use," appropriate or acquire an excess over that actually to be occupied by the improvement, and may sell such excess with such restrictions as "shall be appropriate to preserve the improvement made." This would seem to mean in furtherance of the normal use to which the property that is occupied

[2] *Blair* v. *Cummings County*, 111 U. S. 363; *Head* v. *Manufacturing Co.*, 113 U. S. 9; 198 U. S. 361; 200 U. S. 527; *Hairston* v. *Railway Co.*, 208 U. S. 599.

by the improvement is devoted,—here the use and preservation of the street for the purposes of travel. If it means, as the city here contends, that property may be taken for the purpose of selling it at a profit and paying for the improvement it is clearly invalid.

It is of course true that great deference should be paid to the decisions of the courts of a state in determining what is a public improvement. *Hairston* v. *Railway, supra; Lime Co.* v. *Railway Co.*, 233 U. S. 211; *Jones* v. *Portland*, 245 U. S. 217. This rule, though, does not extend, as the city seems to claim, to legislative action, since, as has been said, the question of the character of the use is one for the courts. Neither is the adoption of excess condemnation by foreign countries and by several of the states of the union a matter of importance in these cases, because whether the use is public or private depends necessarily upon the facts relating to the particular subject matter involved. *Irrigation Company* v. *Bradley*, 164 U. S. 113. Moreover, the constitutional rights here relied upon bring about a further lack of relevancy in the practice as carried on in foreign countries. And as respects the legislative action of the states we have been referred to no decision where any such statute has been sustained. The question has not been adjudicated in the Ohio courts. The courts of last resort in Massachusetts, New York, Virginia and Pennsylvania have held that the statutes of those states, at least for the purposes here involved, were a denial of due process of law. *Old Dominion Land Co.* v. *United States*, 269 U. S. 55, is distinguishable from these decisions and from the present cases in that in that case the land was actually devoted to a public use at the time condemnation proceedings were filed. It was also needed for that use at that time and would be needed for it for at least a considerable time thereafter, and it could not be so used except by a taking. We do not hold that the provision of the state constitution might not be validly enforced in a proper case, but that as applied by the city in these cases it violates the due process clause of the constitution.

Decrees affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

I, J. W. Menzies, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the cases of *City of Cincinnati* v. *Margaret W. Vester,* No. 5343; *City of Cincinnati* v. *Jas. S. Richards et al.,* No. 5344; *City of Cincinnati* v. *Llewellyn B. Reakirt,* No. 5345, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In Testimony Whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 7th day of June, A. D. 1929.

J. W. MENZIES

[SEAL] Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1929

No. 372

THE CITY OF CINCINNATI, Petitioner,

vs.

MARGARET W. VESTER

ORDER ALLOWING CERTIORARI—Filed October 21, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1929

No. 373

THE CITY OF CINCINNATI, Petitioner,

vs.

JAMES S. RICHARDS and PASCHAL L. RICHARDS

ORDER ALLOWING CERTIORARI—Filed October 21, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1929

No. 374

THE CITY OF CINCINNATI, Petitioner,

vs.

LEWELLYN B. REAKIRT

ORDER ALLOWING CERTIORARI—Filed October 21, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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CHARLES ELMORE CR

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Supreme Court of the United States

THE CITY OF CINCINNATI, a Municipal Corporation,
Petitioner,

No. 372 vs.

MARGARET W. VESTER,

THE CITY OF CINCINNATI, a Municipal Corporation,
Petitioner,

No. 373 vs.

JAMES S. RICHARDS and PASCHAL L. RICHARDS,

THE CITY OF CINCINNATI, a Municipal Corporation,
Petitioner,

No. 374 vs.

LLEWELLYN B. REAKIRT.

Petition for Writs of Certiorari to the United States Court of Appeals for the Sixth District and Brief in Support Thereof.

John D. Ellis,
City Solicitor.
Ed. F. Alexander,
Assistant City Solicitor.
Attorneys for Petitioner.

COURT INDEX PRESS, CINCINNATI, OHIO ‡ ‡ AUGUST, 1939.

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United States Supreme Court

THE CITY OF CINCINNATI, a Municipal Corporation,

Petitioner,

vs.

MARGARET W. VESTER.

THE CITY OF CINCINNATI, a Municipal Corporation,

Petitioner,

vs.

JAMES S. RICHARDS and PASCHAL L. RICHARDS.

THE CITY OF CINCINNATI, a Municipal Corporation,

Petitioner,

vs.

LLEWELLYN B. REAKIRT.

PETITION FOR WRITS OF CERTIORARI.

To the Honorable Supreme Court of the United States:

Your petitioner, the city of Cincinnati, a municipal corporation organized under the laws of the state of Ohio, respectfully represents to this Honorable court;

A.

Summary Statement of the Matter Involved.

(1) Article XVIII, Section 10 of the Constitution of the state of Ohio provides as follows:

> "A municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement, and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made. Bonds may be issued to supply the funds in whole or in part to pay for the excess property so appropriated or otherwise acquired, but said bonds shall be a lien only against the property so acquired for the improvement and excess, and they shall not be a liability of the municipality nor be included in any limitation of the bonded indebtedness of such municipality prescribed by law."

(2) The city of Cincinnati purposes to widen one of its main down-town streets, East Fifth street, by adding 25 feet to the south side thereof from Main street east to Pike street, a distance of about 1,636 feet. In pursuance of the power granted to it by the aforesaid constitutional provision, the council of the city of Cincinnati by proper resolutions and ordinances appropriated in their entirety all the parcels of real estate abutting the south side of said Fifth street between Main street and Pike street and also five small parcels not abutting said south side of Fifth street but lying within a line drawn one hundred (100) feet south of said south line. Of said parcels so appropriated, a

strip twenty-five (25) feet in width extending from said Main street to said Pike street was taken for the direct purpose of widening said Fifth street, the remainder was taken by way of excess condemnation as authorized by said Section 10 of Article XVIII of the Constitution of Ohio.

(3) Thereafter, your petitioner through its city solicitor applied according to the Ohio statutes to the Court of Common Pleas of Hamilton county, Ohio, in or about April, 1928, to have a jury impaneled to hear testimony as to the value of the said parcels of real estate so appropriated and to assess the compensation payable by your petitioner for said parcels.

(4) Thereafter, the respondents Vester, Richards and Reakirt, being the owners respectively of three parcels of real estate appropriated by your petitioner, filed separate bills in equity in the District Court of the United States for the Southern District of Ohio, Western Division, Nos. 555, 556 and 557, in Equity, seeking to enjoin your petitioner from appropriating any part of their said parcels not included within said twenty-five foot strip to be used directly for said street widening. These cases were heard together by the District Court.

(5) Thereafter, the District Court of the United States for the said Southern District of Ohio granted the prayers of the said respondents and perpetually enjoined your petitioner from proceeding to appropriate such part of respondents' real estate as was appropriated by way of excess condemnation.

(6) Thereafter, your petitioner filed in the Circuit Court of Appeals of the United States for the Sixth Circuit its appeals from said decision of the District

Court being numbered 5343, 5344, and 5345 on the docket of said Circuit Court of Appeals, which said appeals were heard together on one record.

(7) Thereafter, to-wit, on June 6, 1929, the said Court of Appeals for the Sixth Circuit affirmed the said decision of the District Court for the Southern District of Ohio.

(8) Your petitioner presents herewith as a part of this petition, a certified copy of the transcript of the record, including all proceedings in said causes in said District Court and said Circuit Court of Appeals.

B.

Reasons Relied on for the Allowance of the Writs.

Your petitioner is advised and believes that said judgments of the Court of Appeals for the Sixth Circuit are erroneous and that this Honorable Court should require said cases to be certified to it for its determination as provided in paragraph (a), of Section 240 of the Judicial Code, for the following reasons:

(1) Approximately fifteen states of the American Union and a large number of foreign countries have determined that in the making of public improvements, in particular, large improvements, such improvements can be best handled and the most beneficial results obtained for them by applying the principle of excess condemnation.

(2) The decision of the Circuit Court of Appeals, if allowed to stand, will make impossible in the United States the application of said principle of excess condemnation, contrary to the will of the people of the

sovereign states of Massachusetts, New York, Wisconsin, California, Michigan, Virginia, Rhode Island, and Ohio as expressed in their state constitutions and contrary to the statutory provisions of other states.

(3) In deciding against the city of Cincinnati in the said causes, the lower courts have based their decisions on a narrow and unwarranted interpretation of "due process of law" and "public use" at variance with the spirit of the decisions heretofore handed down by the Supreme Court.

(4) The courts below have rendered Section 10 of Article XVIII of the Ohio Constitution ineffective without in terms declaring it invalid. If said section is invalid the Supreme Court should so declare it in order that confusion may be avoided and necessary adjustments made.

(5) The people of Ohio and of the other sovereign states of the American Union whose statutes and constitutional provisions have been rendered ineffective by the said decision of the Circuit Court of Appeals herein, should have the same right to have the judgment herein reviewed by the highest court of the land which they would have by writ of error or appeal in accordance with paragraph (b) of Section 240 of the Judicial Code, had said Circuit Court of Appeals directly declared said provision of the Constitution of Ohio repugnant to the Constitution of the United States.

Wherefore, your petitioner respectfully prays that writs of certiorari may issue out of and under the seal of this court, directed to the United States Circuit Court of Appeals of the Sixth Circuit, commanding said court to certify and send to this court, on a day certain, to be therein designated, a full and complete

transcript of the record of all proceedings of the said Circuit Court of Appeals in said cases, entitled "The City of Cincinnati, a municipal corporation, vs Margaret W. Vester, No. 5343," "The City of Cincinnati, a municipal corporation, vs James S. Richards and Paschal L. Richards, No. 5344," and "The City of Cincinnati, a municipal corporation, vs Llewellyn B. Reakirt, No. 5345," to the end that said cases may be reviewed and determined by said court as provided by Section 240 of the Judicial Code and that your petitioner may have such other or further relief or remedy in the premises as this court may deem appropriate, and in conformity with said provisions of the Judicial Code, and that the said judgments of the said Circuit Court of Appeals in said cases, and every part thereof, may be reversed by this Honorable Court.

THE CITY OF CINCINNATI,
JOHN D. ELLIS,
City Solicitor.
ED. F. ALEXANDER,
Asst. Solicitor.
Counsel for petitioner.

Supreme Court of the United States

THE CITY OF CINCINNATI, a Municipal Corporation,

Petitioner,

vs.

MARGARET W. VESTER.

THE CITY OF CINCINNATI, a Municipal Corporation,

Petitioner,

vs.

JAMES S. RICHARDS and PASCHAL L. RICHARDS.

THE CITY OF CINCINNATI, a Municipal Corporation,

Petitioner,

vs.

LLEWELLYN B. REAKIRT.

BRIEF IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI.

I.

The Opinions of the Courts Below.

The opinion of the United States District Court for the Southern District of Ohio, Western Division in these cases was filed November 28, 1928, R., p. 26.

The opinion of the Circuit Court of Appeals for the Sixth Circuit was filed June 6, 1929, R., p. 103.

To the best of petitioner's knowledge the opinions have not as yet been officially reported.

II.

Jurisdiction.

(1) It is claimed that this court has jurisdiction of this cause under Judicial Code, Section 240, as amended by the Act of February 13, 1925, 43 Stats., 938.

(2) The date of the decrees to be reviewed is June 6, 1929 (Rec., pp. 101, 102).

III.

Statement of the Case.

The facts in each case are identical with the exception of certain facts relating to the location and physical condition of the several plaintiffs' parcels of land.

Acting under the authority of the Constitution of the state of Ohio, the council of the city of Cincinnati on July 6, 1927, passed a Resolution "Declaring the intention to appropriate property for street widening purposes and in furtherance of said purpose to appropriate property in excess of that actually to be occupied by

said improvement." (Rec., p. 85, Defts. Ex. A.)

On March 21, 1928, Council passed Ordinance No. 155-1928 appropriating the property and directing the City Solicitor to apply to a court of competent jurisdiction to have a jury impaneled to assess compensation. (Rec., p. 88, Defts. Ex. B.)

On May 4, 1928, the City Solicitor filed such an application in the Common Pleas Court of Hamilton county, Ohio.

The three plaintiffs below thereupon filed suits in the United States District Court to enjoin the city from proceeding with the appropriation proceedings.

The appropriation proceedings taken by the city were in strict conformity with the statutes of Ohio. (See Ohio General Code, Secs. 3677, 3679, 3680, 3681, 3682.) There is no claim in these cases that the city failed in any respect to comply with the law of Ohio relating to the procedure for the appropriation of property.

The purpose of this appropriation was the widening of East Fifth street from Main street to Pike street by adding to the present width of sixty-six feet a strip of land on the south side thereof twenty-five feet wide. This strip was included in both the resolution declaring intention and the appropriating ordinance. Plaintiffs below make no objection to this appropriation. The resolution and ordinance, however, apply the principle of excess condemnation to this street widening, and, in addition to the twenty-five foot strip, appropriate land immediately adjacent thereto on the south as follows (Plaintiffs Ex. 1, Book of Exhibits):

Main street to Lawson alley, 75 feet, approximately.

Lawson alley to Sycamore street, 124 feet, approximately.

Broadway to McAllister street, 75 feet, approximately.

Lawrence street to Pike street, 75 feet, approximately.

This property constitutes the excess appropriated by the city and is the subject of the present controversy.

The three plaintiffs below are the owners of property located on the south side of Fifth street, from each of whom the city is proposing to appropriate property by means of excess condemnation.

The instant cases present a typical application of the principles of excess condemnation. The two squares of Fifth street in the city of Cincinnati west of Main street, known respectively as Government square and Fountain square may be called the heart of Cincinnati. The width of the street in these two squares is 130 feet from property line to property line. East of Main street, Fifth street becomes a street of 66 feet in width, with a roadway of 40 feet. The street is an important artery for a very large part of the street car and automobile traffic proceeding to the Eastern Hills of the city. Owing to the topography of the city, there is but one main direct approach to the Eastern Hills at the present time. Recently an ambitious plan has been worked out and bonds have been authorized by the electors of the city of Cincinnati for the construction of a large viaduct and boulevard, referred to generally as the Third street-Columbia avenue improvement (Defendant's Ex. R., Book of Exhibits), which is to constitute a new main highway to the eastern hills, proceeding farther to the east before turning north. Fifth street from Main street, for a distance of five squares

east, will form a part of the most direct approach to this proposed boulevard.

In anticipation of these plans, the city several years ago determined to increase the width of this portion of Fifth street by adding twenty-five feet on the south side, the north line of the street being a continuation of the north line west of Main street. Pursuant to the city's plan, two magnificent buildings, to-wit, the Masonic Temple and the Fontbonne building, each occupying a full square on the south side of Fifth street, have been erected and set back to the proposed building line. The people of the city of Cincinnati in 1925, by popular vote, authorized the issue of two million dollars worth of municipal bonds for the purpose of improving and widening East Fifth street.

Funds being thus available, the Council of the city of Cincinnati had two alternatives with reference to this improvement, to-wit, the old method of appropriating merely the twenty-five foot strip and paying damages to residue, and the new method of excess condemnation. The old method would have necessitated the buying, in each case, of the front or most expensive part of the property, and the paying of damages for buildings mutilated, and, in most cases, ruined. The results of the application of this method would be to leave standing along the south side of Fifth street a row of ruined and patched-up buildings which would have the right to stand as long as they did not become a public menace. The only hope for relief from this situation would depend upon the gradual processes of private bargaining between business and industry on the one side, and on the other, the avarice of small owners an-

able and unwilling themselves to make any substantial improvements.

On the other hand, the city was authorized by the state constitution to use the powers of excess condemnation. This involved a consideration of advantages and disadvantages. On the one hand, the use of this method would give the city control of the reconstruction of the south side of Fifth street. It could aggregate the small tracts of land and then dispose of them in lots of such size as would be appropriate to the business and other uses for which the widened Fifth street would be adapted. It could likewise, in disposing of such lots, subject them to any restriction which would be suitable under the circumstances.

On the financial side, council had to consider whether the application of excess condemnation would result in a public benefit. If the city could be sure that the net cost from using excess condemnation would be no greater than the net cost from condemnation by the old method, the advantages resulting to the city from having made available adequate tracts in the downtown district for much needed purposes, and at the same time, securing for the widened highway fitting buildings, would of itself decide the matter in favor of excess condemnation, with the hope, however, that the city would be able to recoup a fair part of the expense of this improvement by reason of the resale value of the surplus property condemned.

A glance at the plat (Pff's Ex. 1, Book of Exhibits) will show that council in laying out its excess condemnation district adopted a reasonable method. It took, in their entirety, every parcel of property from Main to Pike street fronting on the south side of Fifth street,

excepting the Masonic Temple building and the Fontbonne building to which reference has heretofore been made. In addition it took three small lots on the east side of Broadway south of Fifth street not abutting on Fifth street, but lying within 100 feet of it, and similarly it took two small tracts on the west side of Pike street lying within 100 feet of Fifth street.

In each case it is claimed by the property owners that the taking of the excess violates the provisions of the Fourteenth Amendment of the Federal Constitution. No objection is raised to the taking of the twenty-five foot strip.

IV.

Specification of Errors.

(1) The Circuit Court of Appeals erred in holding that the plaintiffs below were denied due process of law as provided by the Fourteenth Amendment of the federal constitution.

(2) The Circuit Court of Appeals erred in holding that the taking of the excess property is not a taking for public use.

V.

Argument.

1. *The Writs should be Granted because of the Importance of the Question Involved.*

Excess condemnation is new in the federal courts. This is the first case in which its validity under the federal constitution has been questioned. It is not new, however, either in theory or practice. Eight states

have by their constitutions authorized excess condemnation, as follows:

Massachusetts, 1911, Art. 70 (rearrangement).
Massachusetts, 1915, Art. 66 (rearrangement).
Ohio, 1912, Art. XVIII, Sec. 10.
Wisconsin, 1912, Art. XI, Sec. 3-a.
New York, 1913, Art. I, Sec. 7.
Rhode Island, 1916, Art. XVII.
Michigan, 1928, Art. XIII, Sec. 5.
California, 1928, Art. I, Sec. 14½.
Virginia, 1928.

The public importance of the present cases becomes immediately apparent when we consider that the decree of the Circuit Court of Appeals renders ineffective the constitutional provisions of these eight states. It is true that in its opinion the court stated, "we do not hold that the provisions of the state constitution might not be validly enforced in a proper case" (Rec., p. 108), but we submit that no type of excess condemnation can be stated that is not fairly tested in the three cases at bar. We are unable to understand the court's suggestion that the constitutional provision of Ohio means a condemnation of excess land in furtherance of the "use and preservation of the street for the purposes of travel" (Rec., p. 108). Such an interpretation, we submit, renders the provision either meaningless or useless. The court referred to a condemnation of extra land necessary for lateral support (Rec., p. 107). But as the District Court pointed out (Rec., p. 27), this power the municipality always had and no constitutional provision was needed for its exercise.

The court further suggests (Rec., p. 107) that the constitution may provide for an excess taking of a rem-

nant of land remaining in a lot after improvement. We submit that the Ohio Constitution neither expressly nor impliedly contains such a restriction and that the distinction between the condemnation of remnants and the broad powers granted in the constitution was too well known in 1912 for the framers of the constitution to mean by their language merely the appropriation of a remnant.

As a matter of fact neither our opponents nor either of the lower courts have ever been able to say what the Ohio Constitution means by excess condemnation if it does not mean a taking of land as typified in the cases at bar. The District Court (Rec., pp. 26-27) suggested that Sec. 3677-12 of the General Code of Ohio was passed with reference to the constitutional provision and offered an example of a constitutional use of excess condemnation. Unfortunately for this view, Sec. 3677-12 was passed in 1904 (97 O. L., 333), and its constitutionality was never questioned. The constitutional amendment was adopted by the people in 1912.

We therefore submit that the cases at bar represent true cases of excess condemnation under the Ohio constitution and that they cannot be held invalid without effectively setting aside the provision of the Ohio constitution and similar provisions of seven other state constitutions. The importance and far reaching effect of such a holding require that it have the sanction of the highest court in the land, if valid.

Furthermore, the actual use of excess condemnation in several states has been so widespread that in fairness, a careful consideration of the procedure should be given by the Supreme Court before the effect of the decision herein is permitted to become final. New York

City has used the power in many street widenings, the Sixth avenue widening being the latest one completed. It is a matter of public knowledge and widespread interest that New York is now using excess condemnation in the great Chrystie-Forsyth street opening. Rochester has appropriated excess property in the Devonshire court extension, University avenue, Rocket street opening and Elmwood avenue widening. The city is now planning a large street widening project by means of excess condemnation. The city of Yonkers, N. Y., has held up a similar project owing to the doubt created by the decision herein. Many other cities have completed projects in the assurance that they were acting under provisions of unquestioned validity.

We submit that the fact that eight states have in their constitutions provided for excess condemnation and that the actual practice under these provisions is so widespread and important, requires that the Supreme Court should give consideration to the questions raised under the federal constitution.

2. *The Purposes of Excess Condemnation.*

Excess condemnation is generally considered from three points of view, ordinarily referred to as the remnant theory, protection of the improvement, and recoupment.

(a) *The Remnant Theory.* Frequently in widening a new street fragments of land remain of such shape and character as to render them unusable. This condition injures the city, first, by bringing about the existence of small and inappropriate structures on the widened thoroughfare. In the second place, the city

suffers financial loss because in actual practice it will pay the total value of a lot by reason of damage to residue and also because the value of the remnant is so decreased and its use so inappropriate that the possibility of assessment is greatly reduced. The property owners are also injured. The abutting owner has on his hands a remnant not subject to development and that can only be sold to an adjoining owner. The adjoining owner has no frontage and must buy from the remnant owner to protect his land from a use of the remnant that depreciates the value of adjoining lots. Excess condemnation by taking, and paying a fair value for the remnant completely solves these difficulties.

(b) *Protection of the Improvement.* Cities today are spending millions in creating wide thoroughfares as traffic arteries and also as locations for needed buildings of adequate size and appropriate type. Every large city has had the experience of attempting to create a suitable street only to be defeated because the abutting property developed unsightly and uneconomical uses. Boulevards are built at enormous expense and are ruined by back yards, outbuildings, buildings mutilated by the improvement, billboards and other uses that destroy the character of the highway. In New York and Chicago wrecked structures have stood for twenty years after the widening. In Cincinnati, the Central Parkway two years after its opening is still littered with such wrecks. Excess condemnation purposes to remedy such conditions by allowing the city to take the whole lot and resell the excess with such restrictions as will preserve the character of the improvement made by the city.

(c) *Recoupment.* By a resale of the excess land

after the improvement is made, the city may at times be able without injustice to anyone, to recoup a portion of the cost of the improvement and thereby reduce the financial burden upon the public at large.

3. *The Circuit Court of Appeals Erred in Holding that Excess Condemnation Violates the Fourteenth Amendment.*

The main part of this branch of the argument is treated under subhead 4, dealing with the question of public use. At this point we simply wish to indicate the implications of the holding of the Circuit Court of Appeals that excess condemnation violates due process of law under the Fourteenth Amendment.

The Fifth Amendment prohibiting the taking of private property for public use without just compensation applies only to the federal government and does not affect the states. *Fallbrook Irrigation District* v. *Bradley,* 164 U. S., 112, 158. It is as an incident to the due process clause of the Fourteenth Amendment, therefore, that excess condemnation has been held unconstitutional by the lower courts.

The theory underlying such a holding must be that the Ohio Constitution in this respect steps beyond the bounds of law and authorizes a purely arbitrary act of oppression. There is no claim in this case that all necessary process is not being pursued in the condemnation proceeding. Compensation is provided for and the usual statutory method is being followed for the determination by a jury of the amount of compensation to be paid, after notice to the property owner and formal trial of the issues of value. Furthermore, no claim is

made that the condemnation is being attempted for the benefit of private individuals. Nevertheless, it is contended that, despite this, the condemnation of the excess *per se* violates the law as to due process and that, no matter how perfect the procedure may be nor how adequate the compensation, the excess cannot be taken. We are really considering a question, therefore, as to whether by their constitutional provisions eight states have stepped outside the realm of law under our accepted legal system and have sought to authorize a purely arbitrary act of confiscation.

If it is the Fourteenth Amendment that prohibits excess condemnation, then prior to the enactment of that amendment excess condemnation was constitutional. This of course is too narrow a view of the subject. Due process of law was not new in 1866 and it had a place in our constitutional history long prior to the Fourteenth Amendment. It is equivalent to "the law of the land" of Magna Charta and is a guarantee against acts of oppression by the government. *Davidson* v. *New Orleans,* 96 U. S., 97, 101. In this view, due process, or the law of the land, is a fundamental expression of the principles of liberty and justice which lie at the base of our civil and political institutions. But, like the constitution itself, it is for an "undefined and expanding future," and its application is broad enough to prevent new abuses as well as to permit new uses. As was said in *Hurtado* v. *California,* 110 U. S., 516, 537:

> "It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance

> of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law."

We submit that those states which by their constitutions have adopted excess condemnation, have declared the law of the land. There is nothing arbitrary or oppressive in that practice. Land is taken by a judicial process and compensation is fixed by a jury upon the evidence presented. So far as due process is concerned there is as much here as in any case of eminent domain.

To hold otherwise would be to conclude that the states of New York, Massachusetts, Michigan, Ohio, Rhode Island, Wisconsin, Virginia and California have all in their constitutions violated the basic legal spirit of the age. A necessary corollary would be that the citizens of countries like Great Britain, which use the principle of excess condemnation, do not enjoy the benefits of "due process of law." A second corollary would be that if the people of the United States desire to enjoy the benefits of excess condemnation, they must eliminate from the United States Constitution the protection of "due process of law."

Viewed in this light, we submit that the questions involved in the cases at bar are vital to the several states mentioned above and that the uncertainty created by the decision of the Circuit Court of Appeals should be obviated by a decision of this court.

4. *The Circuit Court of Appeals Erred in Holding that Excess Condemnation is not for a Public Use.*

The Circuit Court of Appeals held that the city is proceeding upon the recoupment theory alone. (Rec.,

p. 106.) We submit that there is no evidence in the record to sustain such a conclusion. The Ohio Constitution contemplates that the city "may sell such excess *with such restrictions as shall be appropriate to preserve the improvement made.*" It must be presumed that the city will proceed in a constitutional manner if it sells the excess. Insofar as it can do so in advance of an actual determination to sell, the city has indicated that its purpose is to provide for such restrictions on possible resale as may be appropriate. In its resolution declaring its intention to appropriate the city declared (Defts Ex. A, Rec., p. 87), that the excess was taken "in furtherance of the said widening of Fifth street * * * and is necessary for the complete enjoyment and preservation of said public use."

The city may never resell the excess. It is not compelled to do so by the constitution. That is a question to be determined in the future. Recoupment can come only from a sale and we submit that until the city by some act evidences an intent to sell, it cannot be said to be proceeding only on a theory of recoupment. The city has declared that it takes the excess to "preserve the said public use" and that is exactly what the Ohio Constitution empowers it to do. It may preserve the public use in many ways; sale with restrictions is one that may be chosen in the future. But we are not warranted upon such a record in discarding every possible use in favor of a use by sale that may, among other things, result in a possible recoupment, and then go a step farther and conclude that recoupment is the only purpose of the appropriation.

The question for the federal court to determine is whether or not the state in declaring excess condemna-

tion to be a public use has reached a conclusion that is logically impossible or unreasonable. See *Old Dominion Land Co.* v. *U. S.*, 269 U. S., 55, 66.

> "Congress has declared the purpose to be a public use, by implication if not by express words * * *. Its decision is entitled to deference until it is shown to involve an impossibility."

The Supreme Court has in many decided cases held that "public use" is not restricted to actual "use by the public." It has recognized that the history of the law eminent domain is one of development and change and largely within the sound judgment of the states.

In *Strickley* v. *Highland Boy Mining Co.*, 200 U. S., 527, 531, the court say:

> "In discussi what constitutes the public use * * * the court * * * recognized the inadequacy of use by the general public as a universal test."

In *Clark* v. *Nash*, 198 U. S., 361, 369, the court say:

> "This court has stated what is a public use may frequently and largely depend upon the facts surrounding the subject, and we have said that the people of a state, as also its courts, must in the nature of things be more familiar with such facts and with the necessity and occasion for the irrigation of the land, than can anyone be who is a stranger to the soil of the state, and that such knowledge and familiarity must have their due weights with the state court."

In *Fallbrook Irrigation District* v. *Bradley*, 164 U. S., 112, 161, the court say:

> "It is not essential that the entire community or even any considerable portion thereof should directly enjoy or participate in an improvement in order to constitute a public use."

See also *Rindge Company et al.* v. *Los Angeles*, 262 U. S., 700, Syl. 1 and 2.

One cannot explain the many decisions of the federal courts on public use in terms of a general use by the public. The court has considered the question on broader grounds and has held the view that "public use" means "public benefit" or "public advantage," and that such a public advantage justifies the exercise of the power of eminent domain.

In *Old Dominion Land Co.* v. *U. S.*, 296 Fed., 20 (C. C. A., 4, 1924), the court held that a condemnation of land by Congress, if considered for the purpose of resale to recoup a financial loss to the government and to prevent an "immense unearned gain to the land owner" was for a public purpose and use. The court said at p. 22:

> "Therefore, assuming that the condemnation was for the sole purpose of salvage of public treasure which would be saved in no other way, it was for a public use."

In *Strickley* v. *Highland Boy Gold Mining Co.*, 200 U. S., 527, the court sustained a statute of Utah whereby the Mining Company condemned a right-of-way over the land of Strickley for the purpose of constructing an aerial bucket line from the mine to a railroad so that ore might be loaded on freight cars. The court held that the state legislature might determine such a use to be public.

In *Clark* v. *Nash*, 198 U. S., 361, the land of Clark lay between the land of Nash and a river. Acting under a Utah statute, Nash sought to condemn a right of way over Clark's land to bring water to the land of Nash. Clark claimed that this was a private use. The court sustained the statute and held that the use was public.

In *Hairston* v. *Danville & Western Ry.*, 208 U. S., 598, the railway company sought to condemn land belonging to Hairston for the purpose of building a spur track to a tobacco factory. Hairston claimed that this was a private use because the spur served merely a private factory. The court held that the use was a public one.

In *United States* v. *Gettysburg Elec. Ry. Co.*, 160 U. S., 668, private land was appropriated for the Gettysburg National Park. It was claimed that this was not a public use. The court held the use to be public on the ground it tended to enhance the respect and love of the citizen for the institutions of his country.

In *Attorney General* v. *Williams*, 174 Mass., 476, 478-481 (Aff. 188 U. S., 491), the court considered a Massachusetts statute authorizing the condemnation of rights to build to a height of more than 100 feet on Copley Square, Boston. The Massachusetts court held that this was an appropriate exercise of the powers of eminent domain and that the use was public in seeking to promote the beauty and attractiveness of a park.

In the *Appeal of Rees et al.*, 12 Atl., 427, the Pennsylvania court sustained a condemnation as being for a public use by a company organized for the "education of the public by exhibiting artistic, mechanical and horticultural products and providing public instruction in the arts and sciences."

In *Higginson* v. *Nahant*, 11 Allen, 530 (cited with approval in 262 U. S., 700, 708), the Massachusetts court held that a road laid out "with the design to provide access * * * for the public to points or places * * * esteemed as pleasing natural scenery" was a public use.

These cases show the attitude of the courts on the question of public use. They cannot be explained on the ground of use by the public nor on the ground, as stated by the Circuit Court of Appeals in this case (Rec., p. 107), that the use is "so dominantly and directly related to the public as to be indispensable to its welfare."

In the Old Dominion case, financial recoupment was held to be a public use.

In the Strickley case, a private mining corporation was enabled to transport its ore from the mine to the railroad over the land of an intervening owner. The ore was mined and sold for private profit exclusively.

In the Clark case one man was enabled to farm his land more profitably by using the land of an adjoining owner.

In the Hairston case, a railroad company and a tobacco corporation were enabled to increase their earnings by using an intervening owner's land.

In the Gettysburg case, condemnation was justified as furthering a spirit of patriotism.

In the Copley Square case and the Nahant cases esthetic considerations and beauty were held to be public uses.

In the majority of these cases private gain was the primary purpose of the condemnation; the public benefit was incidental thereto. There was no direct use by the

public of the land appropriated. The condemnors were private parties. In the instant case, the public itself is appropriating for what it conceives to be the public advantage. No question of private advantage or private purpose is alleged or could be alleged. How then can it be said that such an appropriation is for a private use?

Under these circumstances and in view of the federal cases cited, how can we say that the state of Ohio has reached an impossible or unreasonable conclusion in granting to its cities the right of excess condemnation? The land is to be taken by a judicial process and no private individual can gain any advantage thereby. The purpose of the appropriation falls well within the limits of public benefit as established by the Supreme Court. The prevention of remnant lots is a public benefit. The sale of the surplus property with restrictions as to building lines, building heights, character of use, time limits for construction, character of construction so as to preserve the economic integrity of the improvement as well as to prevent it from becoming an unsightly street, all these are benefits that flow from the plan and that are exclusively public in their nature. No private benefit for any individual can be shown in which the entire body of citizens do not participate. The recoupment of a part of the expense of the general improvement is a benefit that is entirely public in its nature. If such a result obtains, every taxpayer in the city of Cincinnati will derive a direct financial benefit over a period of many years through the decreased cost of the improvement. Viewed in the light of the decided cases, we are unable to see any other than a public benefit or advantage that can

result from the exercise of this power granted by the Constitution of Ohio.

5. *The Theory of the Zoning Cases Supports Excess Condemnation.*

In the recent cases of *Euclid* v. *Ambler Realty Co.*, 272 U. S., 365, and *Gorieb* v. *Fox*, 274, U. S., 603, this court sustained the right of municipalities to enforce compulsory zoning systems and street set back lines unless the ordinances were clearly arbitrary and unreasonable.

In the Gorieb case, the court conclude their opinion by saying:

> "Since upon consideration we are unable to say that the ordinance under review is 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare,' we are bound to sustain it as constitutional. *Euclid* v. *Ambler Co., supra*, p. 395."

These zoning ordinances unquestionably deprive an owner of property rights. For the public benefit, they restrain him from making certain uses of his property which prior to the enactment of the ordinance he was able to make without question. However, the court will not for a mere theoretical right interfere with a reasonable zoning system.

In a very real sense, the ordinary excess condemnation undertaking is a zoning enterprise. The city takes over the small inadequate lots which abut the improvement and, which, as they are left, are unsuited to the improvement and then lays them out and sells them

with restrictions which are suitable to the zone created by the improvement. .

Excess condemnation is in fact more equitable than zoning. A good zoning law may sometimes impose a real loss on a property owner who submits rather than resort to litigation. Where excess condemnation is used, the owners are necessarily compensated and eliminated before the zoning is put into effect.

6. *Cases Relied on by the Circuit Court of Appeals to Sustain its Opinion.*

A careful examination of the opinion of the Circuit Court of Appeals will show that the court does not cite one case in which a state statute authorizing the appropriation of private property was set aside by a federal court. The court refer (R., pp. 106-107), to (Fallbrook) *Irrigation District* v. *Bradley,* 164 U. S., 112, and *Traction Co.* v. *Mining Co.,* 186 U. S., 239. The citation for the second of these cases is erroneous, and in view of the incomplete title used, counsel have not been able to trace it. The first case has been heretofore cited in this brief. In that case, the Supreme Court refused to set aside legislation by the state of California authorizing the establishment of irrigation districts in arid and semi-arid territory.

Further on in their opinion the Circuit Court say, R. p. 108,

> "The courts of last resort in Massachusetts, New York, Virginia, and Pennsylvania, have held that the statutes of those states, (referring to statutes authorizing excess condemnation), at least for the purposes here involved, were a denial of 'due process of law.' "

This statement of the court is not accurate. The cases referred to are the following:

The matter of Albany Street, 11 Wend. (N. Y.) 149,
Opinions of Justices, 204, Mass. 607,
Opinions of Justices, 204, Mass. 616,
Opinions of Justices, 211, Mass. 624,
Mutual Life Insurance Co. v. *Philadelphia*, 242 Pa. St. 47,
City of Richmond v. *Carneal*, 129 Va. 388.

In each of these cases, the court interpreted a state statute on the basis of its understanding of its own state constitutional provisions; in none of them was the constitution of the United States relied on, and in none of them was 'due process of law' invoked. In the New York case, handed down in the year 1834, (prior to the adoption of the Fourteenth Amendment), the court arbitrarily held that the legislature had no power to authorize a municipality to take the fraction of an inch more than it intended to use. In Massachusetts, the holdings were that the legislature could not authorize the expenditure of money raised by taxation to purchase property which was not to be directly used for a public purpose. In the Pennsylvania and Virginia cases, the court defined public use as equivalent to 'use by the public,' a definition long since discarded by the federal courts. Furthermore, it is to be noted that the answers to the several decisions in New York, Massachusetts and Virginia have been the adoption of constitutional amendments to specifically confer on the legislatures the power the courts had said they did not possess.

VI

CONCLUSION

In conclusion, counsel for the city of Cincinnati maintain that excess condemnation is a principle of general law, being in essence only a logical development of the principle of eminent domain. When a modern city undertakes a great public improvement, it faces at the start a great real estate and financial problem. It must consider not alone the acquisition of the land actually to be used for the widening. It must consider also the development of the land which will abut the improvement and it must consider the distribution of the financial cost. In times past, the development of the abutting land has been left to uncontrolled chance, often with deplorable results. As to the financing, the public has usually borne the cost and the private owner has reaped the profit.

The modern city seeks to handle its real estate problems in a modern way, viewing the abutting land as essentially part of the improvement, both from the financial and the developmental standpoint. Of what use is a fine harbor improvement, if the abutting shore cannot be used for appropriate piers and wharves? Of what use is a highway to open up a needed area for new homes, if private land owners can prevent the new homes from arising by their avarice, their lack of intelligence or the lack of co-ordination of their forces.

Possibly as a matter of policy, excess condemnation is, in many cases, unwise. So also is the direct use of eminent domain at times unwise. The constitution cannot consider the matter of policy. Its purpose is to protect not against the general application of new legal

principles approved by the people or their representatives, but against the arbitrary or tyranical use of power directed at the individual under the guise of law.

Counsel are of the opinion that due process of law is not properly involved here. Where excess condemnation has been incorporated into the constitution of a state, it is literally the "law of the land". "Due process of law" can exist in a state practising excess condemnation as well as in one which does not.

In view of all the foregoing, counsel for the city of Cincinnati respectfully submit that these cases ought to be reviewed by the Supreme Court.

JOHN D. ELLIS,
City Solicitor,
ED. F. ALEXANDER,
Assistant Solicitor,
Counsel for Petitioner.